ESSENTIALS OF THE LAW
IN TWO VOLUMES

VOL. 1 BLACKSTONE
VOL. 2 ELEMENTARY LAW

ELEMENTARY LAW

VOL. II.

COMPRISING THE ESSENTIAL PARTS

OF

AGENCY
CONTRACTS
CORPORATIONS
EQUITY (Including Pleading and Procedure)
EVIDENCE
NEGOTIABLE INSTRUMENTS
PARTNERSHIP
COMMON LAW PLEADING and
TORTS

WITH NOTES AND REFERENCES

FOR THE USE OF

STUDENTS AT LAW

SECOND EDITION

BY

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PREFACE TO VOL. II, SECOND EDITION.

The purpose, method of preparation, etc., of this second volume are substantially the same as in volume I. of this series.

Several new topics have, however, been added in order more fully to cover the ground usually traversed by students at law.

MARSHALL D. EWELL.

Chicago, April 5, 1915.

PREFACE TO VOL. II.

The purpose, plan, and method of execution of the series, of which this forms the second volume, are sufficiently stated in the preface to the first volume. In preparing the present volume the matter has been somewhat more condensed; yet without omitting anything which, in the opinion of the writer, it is essential for the student to know. The subjects treated are among the most important, if they are not in fact the most important, subjects in the course of studies usually pursued by students at law. The works selected for condensation are well and favorably known to the profession; and the experience of the writer as an instructor leads him to hope that his work will prove useful in economizing the time and lightening the labors of those for whose use it has been prepared, namely, students at law.

MARSHALL D. EWELL.

Union College of Law, Chicago,

March 20, 1883.

PREFACE TO VOL III.

This volume forms the third and last of the series, the first of which was published five years ago. The plan adopted in the first two has been retained in this, and the works abridged are well and favorably known to the profession.

The additional experience of five years, and the favorable reception accorded the volumes already published, confirm the editor in the opinion expressed in the Preface to Volume I. as to the usefulness of such books when carefully prepared and judiciously used. It is hoped that the present volume will not be found less useful than its predecessors.

MARSHALL D. EWELL.

Union College of Law, Chicago,
March 16, 1888.

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REFERENCES, ETC.

Lindley on Partnership (3d edition, 1873) is cited by the author's name alone. [Where cited by the editor the 5th English and 2d American editions (Ewell's ed.) is cited by vol. and page.]

The Indian Contract Act (IX of 1872) is cited by the abbreviation I. C. A.

I have sometimes referred to my own book on "Principles of Contract," for the fuller explanation of matters belonging to that general subject, rather than to the Law of Partnership.

Matters of practice and procedure which occur incidentally in the facts of the cases cited as Illustrations have been tactily adapted to the present state of the law.

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THE LAW OF AGENCY.

THE LAW OF PRINCIPAL AND AGENT.[1]

BOOK I.

OF THE CONTRACT GENERALLY: ITS ORIGIN AND DISSOLUTION.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

An agent is a person duly authorized to act on behalf of another,[2] or one whose unauthorized act has been duly ratified.[3]

In every definition of an agent, **the one element in common is the recognition of the derivative authority of the agent**; and this element is really the *differentia* of an agent.[4]

The person from whom the authority is derived is generally called **the principal or employer, more rarely the constituent**; [2] whilst the **agent is sometimes called an attorney, delegate,** or **proxy.** The contract which exists between the principal and agent is called a contract of agency; the right of the agent to act in the name or on behalf of another is termed his **authority** or **power**; and this, if conferred formally by an instrument under seal, is said to be conferred by letter of attorney or power of attorney.

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1. Whenever a reference is made to "Evans on Agency" (Ewell's edition), edited by direction of M. Bender & Co., Inc., is the one meant.

2. See a collection of definitions in Tiffany on Agency, 1-3, note.

3. Co. Litt. 207; Wolf v. Horncastle, 1 Bos. & Pul. 316.

4. Com. Dig. "Attorney," A.; 1 Livermore, 67; Story, § 3; Smith, M. Law, 109; Ind. Contract Act, s. 182.

Agents are divided:

(a) In respect of the extent of their authority, into
Universal;
General;
Special or particular agents:

(b) In respect of the nature of the agency, into
Mercantile and
Non-mercantile agents:

(c) In respect of their liability in selling, into
Del credere agents and
Such as are **not del credere:**

(d) In respect of the extent of their duties, and of the amount of skill required of them, into
Gratuitous and
Paid agents;
Professional and
Unprofessional agents.

A number of other divisions might be readily framed by assuming other points of difference as a basis of division.

General agents are such as are authorized to transact all business of a particular kind;[5] whilst **a special agent is authorized to act only in a single transaction.**[6]

The distinction between special and general agents is of little or no practical value, so far, at least, as regards the principal and third parties. Whenever a dispute arises between them with reference to the authority of the agent, the question is not simply whether the authority is special or general, but it may also be very necessary to inquire, as will appear hereafter, whether the agent's acts are within the apparent scope of his authority.[7] If the agent exceeds his special authority, and in so doing makes his principal liable, the latter is entitled to [3] claim compensation from the agent for such damages as have resulted from the unauthorized act.

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5. Gilman v. Robinson, Ry. & Moo. 227; Kaye v. Brett, 5 Ex. 269.

6. Brady v. Todd, 9 C. B., N. S. 592; see Whitehead v. Tuckett, 15 East, 400.

7. The fact of agency, general or special, and extent of authority *is a question of fact* for the jury. See Beringer v. Meanor, 85 Penn. St. 223, 41 Ia. 286.

A factor is an agent for the sale of goods in his possession, or consigned to him. He is often called a **commission merchant** or **consignee.**[8] He is called a **supercargo,** if authorized to sell a cargo which he accompanies on the voyage.

Del credere agents are distinguished from other agents by the fact that they **guarantee** that those persons to whom they sell shall perform their part of the contract. A *del credere* agent is not responsible to his principal in the first instance,[9] though the contrary opinion at one time prevailed.[1]

The true definition of a broker is that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. A broker is a mere negotiator between the other parties.[2] If the contract which the broker makes between the parties is a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. Whatever may be the effect of a contract as between the principals, in either case no effect goes out of the broker. If he signs the contract, his signature has no effect as his; but only because it is, in contemplation of law, the signature of one or both of the principals: no effect passes out of the broker to change the property in the goods. **He himself, as broker, has no possession of the goods;**[3] no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods should be delivered to buyer or seller, or either.

According to the business in which they engage, brokers are [4] called **exchange brokers, stockbrokers, merchandize brokers, ship brokers,** and **insurance brokers.**

"**The distinction between a broker and factor is** not merely nominal, for they differ in many important particulars. **A factor is a person to whom goods are consigned for**

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8. The terms *factor and commission merchant* are synonymous. See Perkins v. The State, 50 Ala. 154.

9. Hornby v. Lacy, 6 M. & S. 166.

1. The authorities upon this question are conflicting. See Ewell's Evans Agency *3, note 4.

2. Saladin v. Mitchell, 45 Ill. 79.

3. Saladin v. Mitchell, *supra*.

sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal. But the broker is not trusted with the possession of the goods, and he ought not to sell in his own name."[4]

The factor has a special property in the goods and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority.[5] If the broker sells in his own name, he acts beyond the scope of his authority, and his principal is not bound."[6]

4. Baring v. Corrie, 2 B. & Ald. 142.
5. Id.
6. Saladin v. Mitchell, *supra*.

[9] CHAPTER II.

PARTIES TO THE CONTRACT.

SECT. 1. *The Principal.*

It may be laid down generally that any person sui juris, unless prohibited by the municipal law to which he is subject, may be either a principal or an agent. Inasmuch, however, as the same exceptions do not apply to both principals and agents, we shall first consider what persons may be principals.

By the common law all persons who have power to do a thing in their own right, may do it by an agent; in other words, transfer that power to another.[1]

An elementary principle of the law of contracts is that no contract is binding unless based on the assent of the parties to do or not to do some act or acts,[2] and clearly no assent avails unless the party assenting is capable of doing so at law. **Incompetency to contract** is of two kinds. It is either **natural or legal.** By natural incompetency is meant an incompetency directly traceable to **a mental defect,** whether chronic or temporary; by **legal incompetency,** an incompetency other than natural in the above sense, directly traceable to **a provision of municipal law.** The incompetency of **lunatics, idiots, and drunkards,** is of the former kind; that of **aliens, infants, married women,**[3] **outlaws and convicts, and seamen,** of the latter kind. Incompetency is either **absolute or limited;** and its effect may be either to make a contract altogether **void,** or to give to one party rights denied to the other, as formerly in the case of the **voidable** contracts of infants made with persons competent to contract.[4]

First, as to disability on the ground of natural incompetency.

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1. Coombe's case, 9 Co. Rep. 756; Com. Dig. "Attorney," c. 1.

2. Jackson v. Galloway, 6 Scott, 786; 1 Pot. on Obl. I, 112.

3. See *post*, contracts for treatment of these disabilities.

4. Bac. Abridg. Infancy, I, 3.

When one of the parties to a contract is of unsound mind, and the fact is unknown to the other contracting party, no advantage having been taken of the lunatic, this unsoundness of mind will not vacate a contract, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored altogether to their original position.[5] It is conceived that the same result would take place, if the contract were made through another who acted upon the authority of the lunatic, without having been aware or taken advantage of his state of mind. The principle of the above decision was acted [11] upon in a more recent case, Beavan v. M'Donnell.[6]

As to the disability of drunkards, the rule is, that if a person makes a contract in such a state of drunkenness as not to know what he is doing, the other contracting party, who knew him to be in that state, cannot compel him to perform **the contract,**[7] which, however, is **not void, but voidable only,** and so may be ratified in a sober moment.[8]

The contracts of infants are either binding voidable or void. Those contracts of infants are held to be absolutely void which are to his prejudice, or in which there is no apparent benefit or semblage of benefit to the infant.[9]

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5. Molton v. Camroux, 4 Ex. 17; [S. C. Ewell's Lead. Cases on Disabilities, 614.]

6. 9 Ex. 309; [S. C., 10 id. 184.] The principle of the case of Molton v. Camroux is adopted or approved in Campbell v. Hooper, 3 Sm. & G. 153; Elliott v. Ince, 7 De G., M. & G. 487; Hassard v. Smith, 6 Ir. Eq. 429; Young v. Stevens, 48 N. H. 133. See, however, Gibson v. Soper, 6 Gray 279. For the rule in equity, see Niell v. Mosley, 9 Ves. Jr. 478; Ewell's Lead. Cases, 628, 631, note.

On principle it would seem that the power of attorney of an infant stands on the same basis as any other act of an infant, and should be considered voidable, not void. The weight of authority is, however, at present undoubtedly against this position; but at all events, the doctrine that an infant's act done through an agent are void, should be restricted to acts done under mere naked powers of attorney to do acts requiring an authority under seal. See the subject considered at length, and the authorities reviewed, in 13 Am. Law Rev. 287, 288; Ewell's Lead. Cases on Disabilities, 44 *et seq.*

7. Hamilton v. Grainger, 5 H. & N. 40; Gore v. Gibson, 13 M. & W. 623; S. C., Ewell's Lead. Cases on Disabilities, 734, 738, note and cases cited.

8. Matthews v. Baxter, L. R. 8 Ex. 132; Broadwater v. Darne, 10 Mo. 277.

9. This was the rule laid down in

The competency or incompetency of a married woman to appoint an agent, turns upon the nature of her rights, that is to say, upon the question whether they are those of a **feme covert** or **those of a feme sole. The power of a married woman to appoint an agent is co-extensive with her rights to act as a feme sole.**[1] **By the common law a married woman cannot in her right as feme covert make a binding contract during coverture.**[2] **In order to bind her husband, she must be shown to have authority, express or implied, to act as his agent.**[3] **She has the right of a feme sole in the following cases:** When she has been **divorced a vinculo,** or separated by decree of judicial separation, or **when deserted** by her husband and in possession of a protection order,[4] or when **the husband has abjured the realm.**[5] She was in a [12] like position when **the husband had been transported beyond seas as a convict.**[6]

A distinction is made by the common law between the contracts of alien friends and alien enemies. The contracts of the former were generally valid,[7] **but the contracts of the latter are by the common law altogether void,**[8] unless such aliens came into this country under **a safe-conduct,** or [13]

Keane v. Boycott, 2 *H. Black*, 511; S. C., Ewell's Lead. Cases on Disabilities, 17, and it is supported by quite a number of authorities. It is not, however, believed to be supported by the weight of modern authority, which very clearly, as it seems, tends to hold all contracts of infants (except his implied contracts for necessaries, those appointing agents and some few others) voidable only, and not void. The cases will be found collected in Ewell's Lead. Cases, 30 *et seq.*, and in 13 Am. Law Rev. 280.

1. See 2 Story's Eq. Jur. §§ 1391-1402; Story on Agency, § 6.

By statute in most of the States the disabilities of married women have been largely removed. Consult the local statutes.

2. Marshall v. Rutton, 8 T. R. 545; Lewis v. Lee, 3 B. & C. 291; Fairthorne v. Blaguire, 6 M. & S. 73. See the American cases collected in Ewell's Lead. Cases on Disabilities, 312 *et seq.* See *post* Contracts.

3. Montague v. Benedict, 3 B & C. 631. Smith on Contracts, *431; Freestone v. Butcher, 9 C. & P. 643; Leeds v. Vail, 15 Penn. St. 185.

4. 20 & 21 Vict. c. 85; and Ramsden v. Brearley, L. R., 10 Q. B. 147.

5. Lean v. Schutz, 2 W. Bl. 1199 Lewis v. Lee, 3 B. & C. 297.

6. Carroll v. Blencow, 4 Esp. 27. Consult the local statutes on these topics.

7. Co. Litt. 1296; Bac. Abr. "Aliens," D. J.

8. Roll. Abr. "Alien," B.; Brandon v. Nesbitt, 6 T. R. 23; [8 East 273].

unless they lived here by the sovereign license.[9]

Outlaws, as the name implies, are without the protection of the law; they are *civiliter mortui*, and can appear in court only for the purpose of reversing the outlawry.[1]

SECT. 2. *The Agent.*

Agents are not required to possess the same qualifications with principals; indeed, it may be laid down as a general rule that **all persons of sane mind are capable of becoming agents.** Few persons, if any, are excluded from exercising a naked authority to which they are delegated. Hence monks, infants, feme coverts, persons attained, outlawed, or excommunicated, villains and aliens, may be agents.[2] But infants and feme coverts cannot be attorneys to prosecute suits nor to execute an authority coupled with an interest.[3]

Although few persons are disqualified from becoming agents, the conduct of those who act in that capacity is watched with great jealousy by the law. Thus no agent will ever be allowed to take upon himself incompatible duties and characters, or to act in a transaction where he has an adverse interest or employment.[4]

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9. Boulton v. Dobree, 2 Camp. 152; Wells v. Williams, 1 Salk. 46. See *post*, Contracts for treatment of all the foregoing disabilities.

1. *Re* Mander, 6 Q. B. 867, 873; Aldridge v. Buller, 2 M. & W. 412. See Contracts *post*.

2. Governor v. Daily, 14 Ala. 469 (a slave); Hartford Fire Ins. Co. 117 Mass. 479 (an infant partner). The wife may act as agent for her husband. See *ante*.

3. Co. Litt. 52a; Hearle v. Greenbank, 3 Atk. 695. See, however, Bradish v. Gibbs, 3 Johns. Ch. 523; S. C. Ewell's Lead. Cases on Disabilities, 259, 274, and note.

4. Dunne v. English, L. R., 18 Eq. 524. It is laid down as a general principle that *the same individual cannot be the agent of both parties*. Hinckley v. Arey, 27 Me. 362.

It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him. It is at his option to repudiate or affirm the contract, irrespective of any proof of actual fraud. Greenwood v. Spring, 54 Barb. 375.

In Adams Mining Co. v. Senter, 26 Mich. 73, and in Colwell v. Keystone Iron Co., 36 id. 51, the rule is laid down that there is no principle of law which precludes a person from acting as agent for two principals. "There is no validity in such a proposition. The authority of agents

Since no one can delegate except what he may do in his own right, clearly no agent can be appointed to do a prohibited act.[5]

Neither can one of the parties to a contract be the agent of the other for the purpose of signing the contract.[6]

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may, when no law is violated, be as large as their employers choose to make it. It is only where the agent has personal interests conflicting with those of his principal, that the law requires peculiar safeguards against his acts.

One cannot act, however, as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency and receiving commissions from both. Meyer v Hanchett, 39 Wis. 419; s. c., 43 id. 246. See *post*.

5. Heugh v. Abergavenny, 23 W. R. 40. See the leading case of Collins v. Blantern, 2 Wils. 341, 1 Smith's Lead. Cases (6th Am. ed.); *489, and notes.

6. Wright v. Dannah, 2 Camp. 203; Adams v. Scales, 57 Tenn. 337.

[16] CHAPTER III.

THE APPOINTMENT OF AGENTS.

It is a rule of law that no one can become the agent of another except by the will of the principal;[1] but this will may be either expressed clearly or it may be implied from particular circumstances. It may be expressed in writing or orally; it may be implied from the fact that a person is placed in a situation in which, according to the ordinary usages of mankind, he would be understood to represent and act for another.[2] An agent or attorney may ordinarily be appointed by parol in the broad sense of that term at the common law, that is, by a declaration in writing not under seal, or by acts and implication.[3] The most usual mode of appointment is by an unwritten request, or by implication from the recognition of the principal, or from his acquiescence in the acts of the agent.[4]

The mode in which an agent should be appointed depends upon (1) **the form in which his authority is to be executed,** and (2) **the corporate or other character of the body** from which his authority is derived.

(1) **Where an agent is to execute his authority by deed, it is absolutely requisite that the authority to do so should be under seal.**[5] A distinction, however, is drawn between

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1. Pole v. Leak, 8 L. T. Rep. 645, 38 L. J. 155, Ch.; Stringham v. St. Nicholas Ins. Co., 4 Abb. App. Dec. 315.

Nor can the authority of the agent to bind the principal be proved by his statements as to the extent thereof. Maxey v. Heckethorn, 44 Ill. 438.

Nor can a special agent enlarge his authority by his own statements, so as to bind his principal. Stollenwerck v. Thacher, 115 Mass. 224.

2. Pole v. Leak, 8 L. T. Rep. 645, 38 L. J. 155, Ch.

3. Story on Agency, s. 47; Paris v. Lewis, 85 Ill. 597.

4. Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 145.

5. Co. Litt. 486; White v Cuyler, 6 T. R. 176; Berkeley v. Hardy, 5 B & C. 355; Hibblewhite v. McMorine, 6 M. & W. 200; Wheeler v. Nevins, 34 Me. 54; Dispatch Line of Packets v. Bellamy Manufg Co., 12 N. H. 205.

If the deed is signed by the agent in the presence and by the direction of the principal, an oral request is all that is required. McMurty v. Brown, 6 Neb. 368; Gardner v. Gardner, 6 Cush. 483; Ball v. Dunsterville, 4 Term. 313; The King v. Longnor, 1 Nev. & M. 576; s. c., 4 B. & Ad. 647.

an authority to contract for a lease or interest in land [18] and an authority to sign the instrument by which the interest passes. In the former case the authority may be conferred orally.[6]

(2) At common law, a body corporate could not make a binding contract except by deed under its common seal. This rule prevailed both in equity and at law;[7] nor could the want of such a deed be cured by a mere resolution of the corporation members.[8] The strictness of the common law rule, however, appears to have admitted of exceptions[9] at an early period.[1]

A municipal corporation may make a binding parol contract apparently only where the act is required for convenience, or where either the acts are trivial in their nature and of frequent occurrence, so that the doing them in the usual way would be inconvenient or absurd, or such that an overruling necessity requires them to be done at once.[2]

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6. Coles v. Trecothick, 9 Ves. 250; Mortlock v. Buller, 10 ibid. 311, 5 Vin. Abr. 524.

This rule is changed by statute in some of the states. See Bissell v. Terry, 69 Ill. 184.

7. Winne v. Bampton, 3 Atk. 473.

8. Mayor of Ludlow v. Charlton, 6 M. & W. 815; Carter v. Dean of Ely, 7 Sim. 211.

9. See the text and note of Evans' Agency for these exceptions.

1. It is a settled rule of law in the United States that, unless the charter or by-laws absolutely require an entry of record, not only the appointment, but the authority of the agent of a corporation may be by parol or implied from the adoption, recognition of, or acquiescence in his acts by the corporation. Rockford, R. I. etc. R. R. Co. v. Wilcox, 66 Ill. 417; Smiley v. Mayor, etc., 6 Heisk. 604; Fleckner v. Bank of U. S., 8 Wheat. 338; Maine Stage Co. v. Longley, 14 Me. 444.

2. Per Alderson, B., Diggle v. London & Blackwall Rail. Co., 5 Ex. 442.

Judge Dillon, in his work on Municipal Corporations, § 383, where the cases are fully collected, says that "corporations may be bound by implied contracts within the scope of their powers, to be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing;" and that "this doctrine is applicable equally to public and private corporations, but in applying it, however, care must be taken not to violate other principles of law;" and such seems clearly to be the law in this country. See, also, id. §§ 132, 750; Ang. & Ames on Corp. § 237, where it is stated that "in general, throughout the United States, it [the old rule of the English law] is entirely exploded."

[23] CHAPTER IV.

JOINT PRINCIPLES.

The power of authorizing another to do a certain act or to ratify an unauthorized assumption of authority may be vested either in a single individual or in a number of individuals. It is a fundamental rule of the law of agency that whatever a person may do in his own right he may do by means of an agent. Hence it follows that if one of several principals may of his own right act on behalf of the other principals, he may appoint an agent to act on their joint behalf. One of several principals has clearly no such power where each of them has a distinct interest in the subject matter, unless the others consent.[1]

Where more than one person has an interest in any chattel, they are either tenants in common, joint tenants, or partners. With respect to joint tenants and tenants in common, the general rule is that one joint tenant or one tenant in common has no [24] implied authority to appoint an agent to act for the other co-owners.[2] Joint tenants, it is said, are seized *per my et per tout;* they have only a right to a moiety respectively. Hence, if all joined in a feoffment, each gave but his part.[3]

Several principals may employ the same agent without incurring a joint liability — in other words, without becoming liable as partners.[4] In Lindley on Partnership,[5] the learned author has pointed out with great clearness the **salient distinctions between co-ownership and partnership. Unlike partnership, co-ownership is not necessarily the result of agreement, nor does it necessarily involve community of profit or of loss.** So true is it **that partnership is a branch of the law of agency,** that when a person is sought to be made liable on the ground of his being a partner, **the true test is whether or not he has constituted**

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1. See Tiffany on Agency, 110.
2. Story on Agency, § 39.
3. Bac. Abr. Estates, K. 6.
4. As to double agencies, see *ante.*
5. See *post* Partnership.

the other alleged partner his agent in respect of the partnership business.[6]

Each of several co-owners of a thing can only sell or authorize the sale of his own interest in that thing, but all the co-owners may combine to sell or authorize the sale of the whole thing.[7] There is, again, nothing which precludes several co-owners from jointly retaining a solicitor to bring or defend an action relating to their common property. Whether they have done so or not depends upon the circumstances of the particular case.[8]

The question often arises whether persons who combine to carry out certain plans or schemes **are joint principals** in any transaction. **The rules governing the liability of committeemen, projectors, and the like, do not differ in principle from the** [29] **ordinary rules** by which a question of liability upon a contract is determined. The question for consideration is, **whether the work in question had been done on the credit of the defendants, either upon an express or an implied contract.**[9]

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6. Buller v. Sharp, L. R., 1 C. P. 36; 35 L. J., C. P. 105.

The agent of a partnership is not the agent of the partners individually, but of the firm collectively. Johnston v. Brown, 18 La. Ann. 330.

7. Keay v. Fenwick, 1 C. P. Div. 745.

8. Ibid.

9. Wood v. Duke of Argyle, 6 M. & G. 928. See, also, Cross v. Williams, 7 H. & N. 675; Burls v. Smith, 7 Bing. 705.

[32] CHAPTER V.

JOINT AGENTS.

Where an authority is given to a number of agents, a question may arise with regard to the proper mode of executing such authority. The difficulty here referred to relates only to cases governed by the general rules of law regulating the execution of a joint authority. A distinction must be made in this respect between public and private agency. In the latter case it is a rule of the common law that where an authority is given to two or more persons to do an act, the act will not bind the principal unless all concur in doing it.[1] Thus it is said in Coke upon Littleton, that if joint attorneys were appointed to receive livery for another, and livery and seisin were made to one of them in the name of both, this would be clearly void, unless the authority was joint and several, because they had but a bare authority, both in law making but one attorney. So it is laid down that in considering whether the authority of two or more joint agents survives upon the death of one of them, we must note there is a diversity between a naked trust or authority and one coupled with an estate or interest,[2] as well as between authorities created by the party for private causes, and authority created by law for the execution of justice. Hence, if a man give a letter of attorney to two, to do any act, and one of them die, the survivor shall not do it; but if a *venire facias* be awarded to four coroners to impanel and return a jury, and one of them die, yet the others shall execute and return the same. So if a charter of feoffment were made, and a letter of attorney to four or three jointly or severally to deliver seisin, two of them could not make livery; [33] whereas, if the sheriff upon a *capias* directed to him made a warrant to four or three jointly or severally to arrest the defendant, two of them might arrest

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1. Tiffany on Agency, 112. Towne v. Jaquith, 1 Mass. 46 (arbitrators); Green v. Miller, 6 John. 39 (arbitrators); Hawley v. Keeler, 53 N. Y. (anno. reprint) 114; Peter v. Beverly, 10 Pet. 532, 564.

2. Where the power is coupled with an interest, it may be executed by the survivor. Peter v. Beverly, *supra*; Osgood v. Franklin, 2 Johns. Ch. 19; Franklin v. Osgood, 14 John. 527, 553.

him, because it is for the execution of justice, which is *pro bono publico,* and therefore shall be more favourably expounded than when it is only for private ends.

The strict rule, that a joint and several authority will be stringently construed, has in recent times been somewhat relaxed. Thus, in the old law books it was said that, if a letter of attorney to make livery of seisin, *conjunctim et diversim,* be made to three, and two of them make livery, the third being absent, it is not good, for this is not *conjunctim* or *disjunctim.*[3] In Guthrie v. Armstrong,[4] decided in 1822, a power of attorney given to fifteen persons jointly or severally was executed by four of them; this was held to be a sufficient execution of the power: Abbott, C. J., whilst acknowledging the correctness of the old authorities, declined to extend the rule to any new cases.

Where the authority is of a public character, the argument ab inconvenientia has been admitted in support of the validity of acts done by order of less than all the persons authorized to concur.[5] In Witnell v. Gartham,[6] **Lawrence, J., states it as a general principle that where a body of persons is to do an act, the majority of that body will bind the rest;** and in Grindley v. [34] Barker,[7] after an elaborate judgment, it was decided by the court, consisting of Chief Justice Eyre, and Justices Buller, Heath, and Rook, **that if a power of a public nature be committed to several, all of whom meet for the purpose of executing it, the act of the majority will bind the minority.** "It seems to me," said Mr. Justice Buller, "that the authority of Co. Litt. 181 b, if we went no further, is decisive; because it is there said in express terms that in matters of public concern the voice of the majority shall govern. * * * Not a single case, not a dictum has been quoted on the other side of the question."[8]

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3. Viner's Abridg. "Attorney," B. 7; and see Com. Dig. "Attorney," C. 11; and Co. Litt. *supra.*

4. 5 B. & Ald. 628.

5. Rex. v. Beeston, 3 T. R. 592, per Lord Kenyon, C. J.; and see Attorney-General v. Davy, 2 Atk. 212.

6. 6 T. R. 398.

7. 1 B. & P. 229.

8. *To the same point, see* Towne v. Jaquith, 6 Mass. 46; Green v. Miller, 6 John. 39; Commissioners v. Lecky, 6 S. & R. 166; Jewett v. Town of Alton, 7 N. H. 253; Soens v. City of Racine, 10 Wis. 271.

[35] CHAPTER VI.

THE DOCTRINE OF DELEGATION.

SECT. 1. *The Delegation of Original Authority.*

Delegation, in the sense assigned to the term at the common law, means the act of investing one or more persons with authority to do some act or acts. Where the authority is original, the general maxim of the law of England applies, that whatever a person may do of his own [36] **right, he may do by another. Where, on the other hand, the authority in question is a delegated authority, the well-known rule is that such an authority cannot itself be delegated.** Both rules, as will be seen hereafter, are subject to **modifications** and **exceptions.**

Where, then, the authority is original, and not derivative, the exceptions to the rule allowing full power of delegation, may be ranged under **two heads. There can be do delegation of the performance:**

(1) **Of an illegal act;**[1]

(2) **Of an act of a personal nature.**

(1) The principle of public policy is this: ***Ex dolo malo non oritur actio.***[2] No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to rise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no right to be assisted. If so, upon that ground the court gives, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

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1. "If the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful." 1 Black. Com. 430; Elmore v. Brooks, 6 Heisk. 45; Brown v. Howard, 14 Johns. 120. Authority of an agent to do an illegal or immoral act will not be presumed, but must be proved. Gokey v. Knapp, 44 Iowa, 32; Marsh v. South Carolina R. R. Co., 56 Ga. 274.

2. No action arises from a fraud. See Collins v. Blantern, 1 Smith L. C. (7th Am. ed.) 489, and notes.

(2) A few instances of the second exception will suffice to show its application. Thus, it is said a man could not do homage or fealty by attorney, for the service is personal.[3] So the lord [38] might beat his villein, and if it were without cause the villein had no remedy; but the lord could not authorize another to beat him without cause.[4] On the same grounds, anyone who has but a bare authority or power cannot act by another,[5] unless the authority or power is ministerial.

SECT. 2. *Delegation of Authority by Agents.*

The general principle of our law is consistent with that of the civil law in denying to agents, except in certain cases, the right of delegating the authority with which they have been invested. The maxim "*Delegata potestas non potest delegari*"[6] is equally appropriate to both systems of law. If no express authority for the power of delegation exists, there is a presumption that the agent has no such power. When the maxim has been applied various reasons have been given for its application. Thus an agent cannot delegate his authority where his personal skill is essential,[7] or where the authority is a judicial authority,[8] or where it is a trust and confidence reposed in the agent,[9] or where the authority gives the agent a discretionary power,[1] unless the discretion is to be exercised in respect of a merely ministerial act, in which case a deputy may be appointed.[2]

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3. 9 Co. 76a.

4. 9 Co. 76a.

5. Ibid.

6. Delegated power cannot be delegated. See, generally, Tiffany Agency, 116.

7. Burial Board of St. Margaret, Rochester v. Thompson, L. R., 6 C. P. 457.

It is within the general authority of an attorney to employ subordinates, but not substitutes, the only exceptions being in cases of actual necessity, or where the interests of the client are clearly promoted, as where the expenses of a journey may be saved. Weeks on Att'ys, § 246; McEwen v. Mayzck, 3 Rich. 210; Power v. Kent, 1 Cow. 211. See the subject fully considered in Weeks on Att'ys, *supra*.

8. Baker v. Cave, 1 H. & N. 678.

9. Bac. Abr. "Authority," D.

1. Alexander v. Alexander, 2 Ves. 640.

2. Per Willes, J., in Burial Board, etc. v. Thompson, *supra*, 458.

An important distinction to be borne in mind in considering whether an agent may or may not appoint a deputy to do wholly or in part that which the agent is himself appointed to do, is founded upon the distinction **between a ministerial and a judicial officer. The former may, whereas the latter, unless expressly authorized, may not, appoint a deputy.**[3] Hence, it was said, a constable, a chamberlain, an alderman, an auditor in the exchequer, an escheator, a sheriff, a dean, a parish clerk, being ministerial officers, could appoint a deputy.[4]

Wherever an agent is expressly authorized to appoint a deputy, whether by the terms of his agency or by an enactment of law, no question arises with regard to his power to delegate his authority, provided the subject-matter of the agency is such as may lawfully be delegated. There are, however, other cases in which it will be lawful for the agent to appoint a deputy. These cases, of course, are exceptions to the maxim, "*Delegata potestas non potest delegari*" and may be classed under the following heads:

An agent may, *prima facie,* **appoint a deputy and delegate authority to him—**

(1) **Whenever he is allowed to do so by a lawful custom or usage;**
(2) **Where the act is purely ministerial;**
(3) **Where the object of the agency cannot lawfully be attained otherwise;**
(4) **Where the principal is aware that his agent will appoint a deputy.**

First, then, as to the cases governed by usage and custom. Wherever, however, reliance is placed upon a custom or usage of trade, it should be borne in mind that the criterion of the legality or illegality of a custom is supplied by an answer to the question, Does the alleged custom change the intrinsic character of the contract, or does it merely control the mode of the performance? If it changes the intrinsic

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3. 1 Roll. Abr. 591, tit. "Deputie;" affirmed by Parke, B., in Walsh v. Southworth, 6 Ex. 156; Com. Dig. "Officer," D. 1.

4. See authorities cited, Com. Dig. "Deputy," D. 1.

character of the contract, or if it is inconsistent with the nature of the employment, the custom will not be deemed valid without notice.[5]

Secondly, when an agent is employed to perform ministerial or mechanical, and not judicial acts, or acts which do not require any exercise of discretion or judgment in respect of acts other than such as are ministerial, he may appoint a deputy.[6] But if a person is appointed to some function, or selected for some employment, to which peculiar skill is essential—as a painter engaged to paint a portrait—he cannot hand it over to some one else to perform. The objection does not apply where the thing to be done is one which any reasonably competent person can do equally well, or when any discretion to be exercised is in respect of a merely ministerial act. In these latter cases a deputy may be appointed. Hence, a sexton may delegate the performance of his duties to a deputy.[7]

Thirdly, the authority of the agent is always construed to include all the necessary and usual means of executing it properly.[8] Arguing from this principle, which is well established, the conclusion is clearly that wherever the agent can show that instructions of the principal could not be properly carried out except through sub-agents, he will be justified in delegating so much of his authority as the nature of the agency requires.[9]

The fourth exception is based upon an assumption of the tacit consent or acquiescence of the principal.[1]

The maxim that delegated power cannot itself be dele-

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5. See the elaborate judgment in Robinson v. Mollett, L. R., 7 Eng. & Ir. Ap. 802; 44 L. J., C. P. 362. As to the effect of custom upon the construction of a contract, see the leading case of Wigglesworth v. Dallison, Doug. 201; 1 Smith's Lead. Cas. *670 *et seq.* and notes.

6. 1 Roll. Abr. 591, "Deputie;" Williams v. Woods, 16 Md. 220; Norwich University v. Denny, 47 Vt. 13; Bodine v. Exchange Fire Ins. Co., 51 N. Y. (anno. reprint) 117.

7. Per Willes, J., Burial Board of St. Margaret's, Rochester v. Thompson, L. R., 6 C. P. 457.

8. Howard v. Baillie, 2 H. Bl. 618; Barnett v. Lambert, 15 M. & W. 489; Franklin v. Ezell, 1 Sneed, 497; Strong v. Stewart, 9 Heisk. 147.

9. See Story on Agency, sect. 14; Tiffany Agency 117.

1. See Johnston v. Cunningham, 1 Ala. 249; Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. (anno. reprint) 434.

ated as a matter of course, is as clearly applicable to the authority of directors as to that of any other agents. It might almost be said that it is even more applicable, for directors are in many respects in the position of trustees. In the words of Lord Romilly, directors are persons selected to manage the affairs of a company for the benefit of the shareholders; the office is an office of trust, which, if they undertake, it is their duty to perform fully and entirely.[2]

2. York & North Midland Rail. Co. v. Hudson, 16 Beav. 491; Howard's Case, L. R., 1 Ch. 561.

[48] CHAPTER VII.

THE DOCTRINE OF RATIFICATION.

SECT. 1. *Of the Essentials of Ratification.*

To ratify is to give sanction and validity to something done without authority by one individual on behalf of another.[1]

After ratification the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and if done by his previous authority.[2] But there can be no valid ratification unless certain conditions have been fulfilled. These conditions refer (1) to the act done, (2) to the conduct of the agent, (3) to the powers of the person who assumes to ratify, (4) to the knowledge of the principal, and (5) sometimes to the form of the contract waiting ratification.

With respect to the act, the general rule is that the act must not be void,[3] **for only defeasible or voidable acts can be ratified,**[4] and a confirmation of what is void avails nothing.[5]

Two rules may be laid down with certainty. In the first place, there can be no ratification of an indictable offence,

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1. Co. Litt. 295 c.

2. Wilson v. Tummon, 6 M. & Gr. 242.

3. See per Ld. Romilly, in Spackman v. Evans, L. R., 3 H. L. 171, 244. *A principal cannot ratify what he cannot authorize.* O'Conner v. Arnold, 53 Ind. 205; Armitage v. Widoe, 36 Mich. 124; McCracken v. City of San Francisco, 16 Cal. 591; Board of Supervisors v. Arrighi, *infra*. See Township of Taymouth v. Koehler, 35 Mich. 22.

4. Gilb. Ten. 75.

5. Ewell's Lead. Cases on Disabilities, 30 *et seq.*, 44, 332. In the United States, whether a person may ratify a forgery of his name is in conflict. Howard v. Duncan, 3 Lans. 174; Forsyth v. Day, 46 Me. 176; Fitzpatrick v. School Commissioners, 7 Humph. 224; Greenfield Bank v. Crafts, 4 Allen, 447; Livings v. Wiler, 32 Ill. 387; Garrett v. Gonter, 42 Penn. St. 143; Union Bank v. Middlebrook, 33 Conn. 95; Thorne v. Bell, Lalor's Supp. 430. See, however, *contra*, Brook v. Hook, L. R. 6 Exch. 79. See, generally, Tiffany Agency, 50, and cases cited.

or an offence against the public policy;[6] in the second place, the doctrine of ratification is only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification.[7] The rules which determine whether an act is void or not for the purposes of ratification have been summed up by a learned writer in terms consistent with the above statement of the law in Right d. Fisher v. Cuthell. Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but remain [amounts] simply to the assertion of a right on the part of the principal, the maxim *"Omnis ratihabitio retrotrahitur et mandato priori oequiparator"*[8] applies.[9] But if the act done by such person would, if unauthorized, create a right to have some act or duty performed by a third person, so as to [50] subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third persons to the consequences.[1] Lord Romilly, in the above cited case, distinguishes between void and voidable transactions, by assuming as a cardinal rule that whenever the validity of an irregular transaction depends on the confirmation of one or more persons, that transaction is voidable only and not void.

What circumstances in the conduct of an agent are necessary in order to make a ratification of such conduct equivalent to a previous command. And here it will be most convenient to consider **the conduct of the person who assumes to act as agent** (1) **in doing the act** or entering into the contract, and (2) **in obtaining a ratification.**

In the former case, the rule is long established that **no**

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6. See next note, *supra.*

7. Per Lawrence, J., in Right d. Fisher v. Cuthell, 5 East, 499.

8. Every satisfaction is attractive and is equivalent to a prior authority.

9. Story on Agency, § 245; Co. Lit. 258*a*; Goodtitle v. Woodward, 3 B. & Ald. 689; Fitchett v. Adams, 2 Str. 1128.

1. See Story on Agency, sect. 246. L R., 6 Ex. 89.

ratification is effectual unless the act has been done by the agent on behalf of the person who ratifies.[2] This is distinctly laid down in the Year Book, 7 Hen. 4, fo. 35. Thus, if a bailiff take a heriot, claiming property in it himself, the subsequent assent of the lord would not amount to a ratification; but if he take it as the bailiff of the lord, the subsequent assent amounts to a ratification of the bailiff's act.[3] The same rule applies when a person distrains without authority.[4]

With respect to the individual who undertakes to ratify the act of another, it is well established that there can be no ratification except by a person ascertained at the time of the act done, that is, by a person who was at the time the act was done in existence either actually or in contemplation of law.[5]

(1) **As to the amount of knowledge which it is necessary the principal should have in order to make his ratification binding**, and, (2), **the necessity in certain cases that the ratification should be made in a form prescribed by the law.**

First, as to the knowledge of the principal. The principle of the case in this particular is **that a ratification becomes binding if made with a knowledge of all material circumstances,**[6] or if made with an intention to assume the risk without inquiry.[7]

With despect to companies, the rules have been stated by a learned judge in clear and concise terms. **Ratification by directors can be of no avail as against a company if the contract is one by which the company would not have been bound even if all proper formalities had been observed; nor**

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2. See Beveridge v. Rawson, 51 Ill. 504; Harrison v. Mitchell, 13 La. Ann. 260; Alldred v. Bray, 41 Mo. 484; Vanderbilt v. Turnpike Co., 2 N. Y. 479; Cooley on Torts, 127, 128.

3. Year Book, 7 Hen. 4, fo. 35.

4. Godbolt's Rep. 1096.

5. Tiffany Agency 54; Kelner v. Baxter, L. R., 2 C. P. 174; Marchand Loan Assn., 26 La. Ann. 389; Rockport R. R. Co. v. Sage, 65 Ill. 328. See Edwards v. Grand Junction Railway Co., 1 Myl. & Cr. 650.

6. Tiffany Agency, 61; Owings v. Hull, 9 Pet. 607; Dickinson v. Inhabitants of Conway, 12 Allen, 487; Reynolds v. Ferree, 86 Ill. 570; Pittsburg, etc. R. R. Co. v. Gazzam, 32 Penn. St. 340; Lester v. Kinne, 37 Conn. 9.

7. Lewis v. Reed, 13 M. & W. 834.

will ratification by the shareholders amount to a ratification by the company if the contract is *ultra vires* of the company.[8] If, on the other hand, the contract would have been binding on the company if all proper formalities had been observed, or if all the shareholders had concurred in it, ratification by or on behalf of the company is perfectly possible.[9] Where the contract is one which it is competent for the directors to make, it is also one which it is competent for them to ratify; and in such a case knowledge by them is for the purpose in question equivalent to knowledge by the company.[1] Where, however, the contract is one which it is not competent for the directors to make, ratification on the part of the shareholders must be proved in order to establish ratification by the company,[2] but such ratification will be inferred from slight circumstances.[3]

Where particular formalities are required to be observed by law in order that a contract may be binding, an informal ratification of an informal contract is of no avail except in the limited class of cases to which the equitable doctrines of part performance are applicable.[4]

SECT. 2. *Ratification, Express and Implied.*

A ratification may be express or it may be implied. When one individual deliberately, whether with full knowledge or without inquiry, ratifies the act or conduct of another, no question arises respecting the fact of ratification. When, on the other hand, there is no express ratification, it becomes important to consider what circumstances have been held sufficient in our courts of law to warrant the inference that a ratification may be implied from them. With respect to the general nature of the evidence sufficient to establish a ratification, the remarks of the learned judges in Fitz-

8. See *ante*.

9. Lindley on Partnership, i. 273 (3rd ed.).

1. Ibid. 274; Smith v. Hull Glass Co., 11 C. B. 897; Wilson v. West Hartlepool Rail Co., 2 De G., J. & Sm. 475.

2. Athenæum Life Assurance Society v. Pooley, 3 De G., & J. 294.

3. Lane's case, 1 De G., J. & Sm. 504.

4. See Lindley on Partnership (4th Lond. ed.), 263.

gerald v. Dressler[5] may be studied with advantage. **To establish a case of authority by ratification there must be some substantive** [64] **proof; it must not rest upon probability or conjecture,**[6] certainly it would be very unsafe to say that because there is a strong probability of the existence of a state of things from which a prior authority or a subsequent ratification might be inferred, a jury would be warranted in acting upon it as if there were strict legal proof.[7]

There are two rules respecting ratification which may be noticed here. **The first is, that if a principal ratifies and adopts the agent's acts, even for a moment, he is bound by them.**[8] In other words, after a ratification there is no *locus poenitentiae.*[9] The second rule is, that there **can be no ratification of a part only of a transaction.** In other words, the law does not allow one part of a transaction to be affirmed and the rest to be disallowed. One cannot "**blow hot and cold.**" **Hence,** to treat a party as one's agent in respect of one part of a transaction, is equivalent to a ratification of the whole transaction.[1] For instance, if a principal ratify a contract made by his agent, he incurs the same liabilities as if he had originally authorized it.[2]

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5. 7 C. B., N. S. 374.

6. Per Crowder, J., 7 C. B., N. S. 397.

7. See per Williams, J., ibid. 396; The facts which the court is authorized to declare conclusive of the intention of a party to ratify unauthorized acts, done in his behalf by another, are such as must be inconsistent with a different intention. Abbott v. May, 50 Ala. 97; Hortons v. Townes, 6 Leigh, 47. See, also, Crooker v. Appleton 25 Me. 131; Cooley on Torts, 128.

Where the evidence is doubtful and may admit of different interpretations. the question of ratification must be determined by the jury. Abbott v. May, *supra;* Hortons v. Townes, 6 Leigh, 47; Burr v. Howard, 58 Geo. 564.

8. Smith v. Cadogan, 2 T. Rep. 189; Hazleton v. Batchelder, 44 N. H. 40; Clark v. Van Riemsdyk, 9 Cranch, 153.

An infant can neither rescind his rescission of a contract, nor his ratification of a deed after reaching majority. Ewell's Lead. Cases, 97, 155.

9. Tiffany Agency, 76; Wilson v. Poulter, 2 Str. 859; Hovil v. Pack, 7 East, 164; Small v. Attwood, 6 Cl. & F. 232; Newall v. Hulrburt, 2 Vt. 351; Benedict v. Smith, 10 Paige, 126; armers' Loan & Trust Co. v. Walworth, 1 N. Y. (anno. reprint) 433.

1. Place for repentance.

2. Wilson v. Tumman, 6 M. & Gr.

A ratification may be inferred from acquiescence.[3] But this acquiescence may itself be **either express or it may be implied.** It may be implied from an act, as in some of the above instances, or, in short, **from any circumstances which clearly indicate an intention to adopt the unauthorized act or conduct of the agent.**[4] In all cases when the acquiescence has been implied from an act, it will be found that the principal has done something which assumes the authorization and validity of the act that awaited ratification; such, for instance, as bringing an action which postulates as a condition for its maintenance the recognition of a previously unauthorized act of the agent.[5]

In considering whether any given facts are sufficient evidence of a ratification, **it is important to consider whether the relation of principal and agent already exists, or** whether the person who has done the act awaiting ratification is **a mere volunteer.** The **distinction** inferred by Livermore,[6] from this difference is [68] that in the former case, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him of what has been done on his account, whereas in the latter case there exists no obligation to answer such a letter, nor will silence be construed into a ratification.[7] Whether silence operates as a presumptive proof

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236; Smethurst v. Taylor, 12 M. & W. 554; Doe v. Goldwin, 2 Q. B. 143.

3. State v. Smith, 48 Vt. 266; Tiffany Agency, 68.

4. A ratification may be inferred from the principal's availing himself of, or claiming the benefits of, the act of one professing to act as his agent, the principal having knowledge of the facts. Fowler v. N. Y. Gold Exchange, 67 N. Y. (anno. reprint) 138; State v. Smith, 48 Vt. 266; Dunn v. Hartford, etc. Horse R. R. Co., 43 Conn. 434; Ogden v. Marchand, 29 La. Ann. 61; Ely v. James, 123 Mass. 36; Chamberlin v. Collinson, 45 Iowa, 429; Aurora Agricultural Society v. Paddock, 80 Ill. 263. This it not, however, conclusive in the case of torts. See Hyde v. Cooper, 26 Vt. 552; Cooley on Torts, 128.

5. Tiffany Agency, 67.

6. Law of Principal and Agent. i. 50; Searing v. Butler, 69 Ill. 575; Kelsey v. National Bank, 69 Penn. St. 426; Kehlor v. Kemble, 26 La. Ann. 713; Pittsburgh, etc., R. R. Co. v. Woolley, 12 Bush. 451. See Evans Agency (Ewell's Ed.), 99, notes.

7. Duer, vol. ii. 151-154, and 178-182, n. 5; Arnould Mar. Ins., i. 151; Story Agency, §§ 255, 258.

depend upon the particular relations between the parties, and the habits of business and the usages of trade.

[70] SECT. 3. *Consequences of a Ratification.*

The maxim of the common law, as we have seen, is that a ratification has the effect of a previous command. The relative rights which may be affected by a ratification are those of

(1.) The principal and the agent;
(2.) The principal and third parties;
(3.) The agent and third parties.

First. The consequences of a ratification, as it affects the relative rights of the principal and agent. The general rule is, that if an act is done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, it becomes the act of the principal if subsequently ratified by him. In such a case the principal is bound by the act, whether it be to his detriment or for his advantage, and whether it is founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority.[8] Hence, if an agent incur expenses by departing from his instructions, and the principal afterwards ratify such departure, the agent is entitled to recover the expenses so incurred.[9] In Hovil v. Pack,[1] the same rule was stated more briefly. If you adopt A. as your agent on your own behaif, you must adopt him throughout and take his agency *cum onere*.[2] The act done must be done for the benefit of the principal.[3]

A ratification must extend to the whole of a transaction. So well established is this principle, that if a party is treated

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8. Wilson v. Tumman, 6 M. & Gr. 236; 6 Scott, N. R. 894; 1 D. & L. 513; Tiffany Agency, 75; Cooley on Torts, 127; Sentell v. Kennedy, 29 La. Ann. 679; Rich v. State Nat. Bank, 18 Kan. 201.

9. Frixione v. Tagliaferro, 10 M. P. C. C. 175.

1. 7 East 164.

2. See, to the same effect, Ramazotti v. Bowring, 7 C. B., N. S. 851, per Erle, C. J.; Attwood v. Small, 6 Cl. & F. 232.

3. Wilson v. Barker, 4 B. & Ad. 614; Goodtitle v. Woodward, 3 B. & Ald. 689.

as an agent in respect of one part of a transaction, the whole is thereby ratified.[4] From this maxim results a rule of universal application, namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity.[5]

Second. **The effect of a ratification upon the relative rights of the principal and third parties. As soon as there is a ratification the principal steps into the place of the agent.** He becomes immediately invested with all the rights and all the duties that flow from the transaction or conduct by him ratified. The person whose conduct is ratified sinks into a subordinate position, and exchanges his original rights and duties, so far as these were due to the particular transaction, for the rights and duties of a duly authorized agent. Hence, where an unauthorized person entered into and signed as agent of the owner an agreement for the sale of an estate, and the owner afterwards signed it, expressing at the [72] same time on the face of the instrument his sanction and approval of the agent's conduct, **the agent could not be rendered personally liable upon the contract,** the purchaser's remedy being against the principal.[6] So if a contract in writing is made for a principal without authority, and the principal subsequently ratifies the contract, the ratification renders the agent authorized to enter into the contract under the Statute of Frauds.[7]

As regards the consequences of a ratification in the case of the agent and third parties, the rule is, that wherever an agent acts without authority he is personally liable.[8] As between the principal and agent, the want of authority is

4. Wilson v. Poulter, 2 Str. 859; Attwood v. Small, 6 Cl. & F. 232. See *ante*, p. 65.

5. Bristowe v. Whitmore, 4 L. T. Rep., N. S. 622; 31 L. J. Ch. 467.

6. Spittle v. Lavender, 2 Brod. & Bing. 452; and see Kendray v. Hodgson, 5 Esp. 228. See Lucas v. Barrett, 1 G. Greene, 510. See, however, Rossiter v. Rossiter, 8 Wend. 494.

7. See Wilson v. Tumman, 6 M. & Gr. 236; Bird v. Brown, 4 Ex. 786; Hilbery v. Hatton, 2 H. & C. 882.

8. East India Co. v. Hensley, 1 Esp. 112; Polhill v. Walter, 3 B. & A. 114; Bowen v. Morris, 2 Taunt. 374. See *post*.

entirely remedied by a subsequent ratification.[9] But in considering how a ratification affects the relative rights of the agent whose conduct is ratified and third parties, a distinction must be made between contracts and torts. When the contract of an agent is duly ratified, credit having been given to the principal, his rights and liabilities arising from that contract are wholly transferred to the party ratifying, and the agent occupies a position identical with that of one invested with full authority to do the act ratified. He can neither sue in his own right nor be rendered personally liable.[1] When, on the other hand, an individual duly ratifies a tort committed by another on his behalf, the ratification has not the same wide effect. For whilst on the one hand it avails to shield the agent from any liability to the principal from the conduct so ratified, it does not take away his liability to third parties who have suffered a tort at his hands.[2] This distinction applies universally, except in cases of ratification by the Crown.[3]

So where a servant or other agent has done some act amounting to a trespass in assertion of his master's right, he is liable, not only jointly with his master, but for every penny of the damage,[4] nor can he recover [75] contribution [indemnity].[5] It is well established that an agent is liable

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9. *Supra.*

1. See *ante.*

The subsequent assent of the principal does not, however, relate back so as to prejudice third parties whose conduct has been guided by the transaction as it actually occurred. Lindley's Int. to Jurisprudence, App. *c v i.* See *ante*, pp. 49-51.

Nor will a subsequent ratification of an unauthorized act have the effect to divest rights acquired by third parties between such act and the ratification. Stoddard v. U. S., 4 Ct. of Cl. 511.

Where an order is drawn in a party's name by his son and clerk, who is attending to business for the father, and the latter afterwards ratifies the act, the order, on acceptance and payment, cannot be impeached or avoided by creditors, in a contest for liens under the mechanic's lien law, where no fraud is shown. St. Louis National Stock Yards v. O'Reilly, 85 Ill. 546.

2. As to what will constitute a person a wrongdoer by ratification, see Cooley on Torts, 127.

3. Buron v. Denman, 2 Ex. 167.

4. See Josslyn v. McAllister, 22 Mich. 300; Thorp v. Burling, 11 John. 285; Richardson v. Kimball, 28 Me. 463; Burknap v. Marsh, 13 Ill. 535 (action for malicious prosecution against an attorney).

5. Best, C. J., in Adamson v. Jarvis, 4 Bing. 66, 73, lays down the

in trover for a conversion to which he is a party, though it be for the benefit of his principal.[6]

The crown may ratify the torts of its agents, and such a ratification has a novel effect upon the relative rights of the agents and third parties. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged; it is still a mere trespass, and the party injured has his option to sue either: if the crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the option of bringing his action against the agent who committed the trespass, or the principal who ratified it, but a remedy against the crown only, if there is any remedy at all, and exempts from all liability the person who commits the trespass.[7]

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rule on this subject as follows: "The rule that the wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the act done by the agent was a plain and manifest wrong, he can have no indemnity, because he will be presumed to have known the act to be such; but if the act directed by the principal was one which he had reason to suppose legal, and he obeyed directions on that supposition, he will be entitled to demand indemnity from the principal. Cooley on Torts, 145 *et seq.*, and the cases cited in the notes.

6. Perkins v. Smith, 1 Will. 328; Cranch v. White, 1 Bing. N. C. 414; Davies v. Vernon, 6 Q. B. 443; and Hilbery v. Hatton, 10 L. T. Rep., N. S. 39, per Martin, B.

7. Per Parke, B., in Buron v. Denman, 2 Ex. 167.

[76] CHAPTER VIII.

OF THE DETERMINATION OF THE CONTRACT.

The authority of an agent may be determined in one of three ways: (1) by agreement, or (2) by act of party, or (3) by operation of law.

(1) **By agreement:**
- a. **By performance of the object of the agency;**
- b. **By efflux of time.**

(2) **By act of party:**
- a. **By revocation** of authority;
- b. **By renunciation** of the agency.

(3) **By operation of law:**
- a. **By death** of principal;
- b. **By death** of agent;
- c. **Bankruptcy** of principal;
- d. **Bankruptcy** of agent;
- e. **Marriage** of *feme sole* (principal);
- f. **Insanity** of agent;
- g. **Insanity** of principal:
- h. **Destruction of the subject matter** of the agency.

SECT. 1. *By Agreement.*[1]

Wherever an express agreement exists, limiting the agency either to some definite object[2] **or for some definite time,**[3] **as, for instance,** where a man is authorized to buy a quantity of merchandise according to sample, or to buy generally for a year, there being at the same time a condition that the employment shall continue in the one case until the merchandise has been bought, and in the other until the year has expired, **the agency will be dissolved in due course by the happening of these results** respectively;

1. See Tiffany Agency, 133.
2. See Benoit v. Connery, 10 Allen 528; Blackburn v. Scholes, 2 Camp. 343.
3. Gundlach v. Fisher, 59 Ill. 172.

and, under ordinary circumstances, no question with respect to a dissolution by act of party in the meantime can arise. It is, however, rare that contracts of agency provide for all contingencies. In the cases to which reference will be made upon this head the difficulty has arisen upon the construction of the agreement.[4]

The rule has now been settled by the House of Lords that, where the parties mutually agree for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named.[5]

SECT. 2. *By Act of Party.*[6]

A principal may revoke the authority of his agent, unless—

(a.) The authority is necessary to effectuate any security,[7] or unless

(b.) The authority is coupled with an interest.[8]

Where the authority given to the agent is a mere naked authority and not coupled with an interest, the principal may revoke such authority at any time before performance.[9] It is not, however, competent to a principal to revoke the authority of an agent without paying for labour and ex-

4. See Burton v. Rwy. Co., 9 Exch. 507; Hochester v. De Latour, 2 E. & B. 678; Aspdin v. Austin, 5 Q. B. 671, and other cases considered at length in the text. Evans Agency, 104, *et seq.*

5. *See, however, Lewis v. Atlas Mutual Life Ins. Co.*, 61 Mo. 534, where it was held that the inability of a corporation to continue in business was no excuse for its breach of contract with an agent.

6. See Tiffany Agency, 133.

7. Walsh v. Whitcomb, 2 Esp. 566.

8. Tiffany Agency, 133; Mansfield v. Mansfield, 6 Conn. 559; Hartley's Appeal, 53 Penn. St. 212; Hutchins v. Hibbard, 34 N. Y. (anno. reprint) 24.

Where the agency is conferred for a valuable consideration, it is held to be irrevocable. Hunt v. Rousmanier, 8 Wheat. 174. See notes, Evans Agency, 111.

9. Mestaer v. Atkins, 5 Taunt. 381; Read v. Rann, 10 B. & C. 438; Broad v. Thomas, 7 Bing. 99 Succession of Babin, 27 La. Ann. 114; Peacock v. Cummings, 46 Penn. St. 434.

pense incurred by [84] him in the course of the employment, unless it is otherwise provided by the terms of the agreement. A general employment may carry with it a power of revocation on payment only of a compensation for what may have been done under it; but there may also be a qualified employment, under which no payment shall be demandable if the authority be countermanded. When the authority of the agent has been revoked, he will be entitled to damages only when the agreement so provides, or when the revocation is wrongful,[1] or when his claim is supported by a custom.

The following powers have been held to be authorities [86] coupled with an interest, and irrevocable: An authority to sell premises, and to apply the proceeds in liquidation of a debt due to the donee of the authority and his partners;[2] an authority to sell certain shares of a ship given by a person largely indebted to the donee of the power;[3] a power of attorney given as part of a security for money, or to effectuate any security;[4] an authority to sell in consideration of the agent forbearing to sue the principal for prior advances;[5] a power of attorney executed for valuable consideration.[6]

An agent may of course renounce his agency at any stage;[7] but if the agency has been undertaken for a valuable consideration, he will be liable in damages to his principal,[8] and the same rule will apply even in the case of gratitous undertakings which have been performed in part by the agent.[9]

[87] SECT. 3. *By Operation of Law.*[1]

" A revocation by operation of law may be by a change

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1. Simpson v. Lamb, 17 C. B. 603.
2. Gaussen v. Morton, 1 0B. & C. 731.
3. Watson v. King, 4 Cowp. 272.
4. Walsh v. Whitcomb, 2 Esp. 565; Drinkwater v. Goodwin, Cowp. 251.
5. Per Parke, B. Raleigh v. Atkinson, 6 M. & W. 676.
6. Bromley v. Holland, 7 Ves. 28.
7. *Where the duration of a contract of agency is not fixed, the agent may terminate it on giving reasonable notice.* Barrows v. Cushway, 37 Mich. 481.
8. White v. Smith, 6 Lans. 5.
9. See Chapter on Liability of Agent to Principal, sect. 3.
1. See, generally, Tiffany Agency, 133, 144.

of condition or of state, producing an incapacity of either party. This proceeds upon a general rule of law, that the derivative authority expires with the original authority from which it proceeds. The power of constituting an agent is founded upon the right of the principal to do the business himself; and when that right ceases, the right of creating an appointment, or of continuing the appointment of an agent already made for the same purpose, must cease also. **In short, the derivative authority cannot generally mount higher, or exists longer, than the original authority.''**[2]

In Coombe's case[3] it was resolved, that where a person has authority as an attorney to do an act, he must do it in the name of him who gave the authority; for he appoints the attorney to be in his place and represent his person. Hence the attorney or agent cannot act in his own name, nor do it as his own act, but in the name and as the act of him who gave the authority. Hence, if a person has a letter of attorney to receive a testator's rents, this **authority will be determined with the testator's death**, being a mere naked authority.[4]

In Blades v. Free,[5] decided in 1829, a man who had cohabited for some years with a woman as his wife went abroad and died, the Court of King's Bench held that the woman might have the same authority to bind him for necessaries as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although the goods were supplied before information of his death had been received.

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2. Story on Agency, sect. 481.

3. 9 Rep. 76b.

4. Shipman v. Thompson, Willes, 105, n.

The death of the principal operates as an instataneous revocation of the agency, where it is a naked power unaccompanied with an interest; and every act of the agent thereafter performed is void so far as the estate of the principal is concerned. Galt v. Galloway, 4 Pet. 332; Hunt v. Rousmanier, 8 Wheat. 174; Davis v. Windsor Saving Bank, 46 Vt. 728; Gale v. Tappan, 12 N. H. 145; Smout v. Ilbery, 10 M. & W. 1.

See, however, *contra*, as to payments made to the agent in ignorance of the death of the principal. Cases cited in notes, Evans Agency (Ewell's ed.), 116.

5. 9 B. & C. 167. See Smout v. Ilbery, 10 M. & W. 1.

A revocation of a bare authority by death is a very different thing from a revocation by the act of the party. In the latter case the plaintiff would undoubtedly be entitled to recover the reasonable expenses he might have incurrd in endeavouring to execute the authority; but in the former, the failure would be the fault of on one; and whatever might be the expense incurred, the plaintiff could not recover against the administratrix.[6]

The authority of an agent is, as a rule, determined by the bankruptcy of his principal, and in the absence of evidence that the trustee of the bankrupt has invested the agent with authority to act for him, or that the authority of the agent is coupled with an interest, the agent has no authority to receive money due to the principal, or to pay away his money.[7]

The bankruptcy of an agent operates as a revocation of his authority, except in cases where the authority is merely to do a formal act which passes no interest, the performance of such act being incumbent upon the agent.[8]

[95] If goods and chattels are in the possession of an agent for any specific purpose, and the agent become bankrupt, such goods or chattels do not pass to the trustee in bankruptcy.

Where a factor, who has been fully paid all his demands against his principal, becomes bankrupt, the property of all the goods remaining in his hands is in the principal. Where, on the other hand, he has a lien on the goods, the claim of the principal is subject to the factor's claim to lien, and if the factor has money due to him from the principal to the amount of the latter's claim against him, the factor's trustee in bankruptcy has a good claim against the principal to the extent of the factor's lien.[9]

It is well established that, as between *cestui que trust* and

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6. Per Crowder, J., in Campanari v. Woodburn, 15 C. B. 409.

7. Minett v. Forrester, 4 Taunt. 541; Drinkwater v. Goodwin, Cowp. 251; Tiffany Agency, 149; Parker v. Smith, 16 East 382.

8. Dixon v. Ewart, 3 Mer. 322; Audenried v. Betteley, 8 Allen, 302; Tiffany on Agency, 149. See, generally, Collier on Bankruptcy.

9. Drinkwater v. Goodwin, Cowp. 256.

trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or its altered state, continue to be subject or affected by the trust.[1]

The marriage of a *feme sole* operates as a revocation of the authority of any agent who has acted for her, although such authority has been conferred by deed.[2] Hence a submission by a woman to arbitration is revoked by her marriage before the award is made.[3]

As to whether the insanity of the principal, in all cases ipso facto revokes the authority of the agent, in cases where the authority is not coupled with an interest[3a] (in which it is admitted it does not act as a revocation), is not clear upon the authorities. It would seem more properly **a suspension** for the time being of the authority of the agent acting under a revocable power.[4] If the insanity has been judicially declared, the adjudication would probably act as constructive notice of the termination of the agent's authority.[5]

An idiot, lunatic, or person otherwise of unsound mind, cannot, as it seems, do any act as an agent binding upon the principal.[6] The case of the insanity of the agent would seem to constitute a natural as well as a necessary revocation of his authority, for the principal cannot be presumed to intend that acts done for him and to bind him shall be

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1. Pennell v. Deffel, 4 De G., M. & G. 372; 23 L. J., Ch. 115.

2. Charnley v. Winstanley, 5 East, 266.

A power of attorney to sell lands, the home of a single man, is revoked by his marriage. Henderson v. Ford, 46 Tex. 628.

Consult the statutes modifying the common law as to married women.

3. M'Can v. O'Ferrall, 8 Cl. & F. 30.

3a. I. e., where coupled with an interest.

4. See, generally, Tiffany Agency, 146; Davis v. Lane, 10 N. H. 156; Motley v. Head, 43 Vt. 633; Matthiessen, etc., Refining Co. v. McMahon, 382, N. J. Law, 536; Molton v. Camroux, 2 Exch. 487; 4 id 17; Ewell's Lead. Cas. (1st ed.) 626, and notes; Evans Agency, 129, 130, notes.

5. Tiffany Agency, 147, and cases cited; 2 Kent Com. 645.

6. Tiffany Agency, 147; Britt. c. 126; Shelford's Law of Sureties, 618.

done by one who is incompetent to understand or to transact the business which he is employed to execute. The exercise of sound judgment and discretion would seem to be required, in all such cases, as preliminaries to the due execution of the authority.[7]

Lastly, the authority of an agent is determined by the destruction of the subject-matter of the agency, or by the determination of the principal's power over it.[8] Thus, if the agent is commissioned to sell a ship which is subsequently destroyed by fire, or goods which are jettisoned, or a racehorse which dies—in all these cases his authority is at an end. So, if the agent sells according to his authority,[9] or if the principal's authority over the subject-matter of the agency is ousted by a paramount authority.

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7. Story Agency, sect. 487.

8. Walker v. Dennison, 86 Ill. 142.

9. Seton v. Slade, 7 Ves. 276. See, generally, as to the effect of a change in the condition of the subject matter of the agency. Williamson v. Churchill, 114 Mass. 184; Proudfoot v. Wightman, 78 Ill. 553; Shelby v. Offult, 51 Miss. 128.

[101] **BOOK II.**

OF THE AUTHORITY CONFERRED.

PART I.

OF THE NATURE AND EXTENT OF THE AUTHORITY.

CHAPTER I.

AUTHORITY GENERAL AND SPECIAL.

An authority is, as to its nature, either express or implied; as to its extent it is either general or special. What is a special authority as between the principal and the agent may be a general authority when third parties are concerned. **A general authority may be defined as an authority to act in a certain character; and a special authority as an authority to do a particular act. In the former case the authority—unless it is restricted to a smaller limit, and the restriction is** [102] **known or ought to be known to third parties—carries with it all the ordinary powers incident to that character; whilst in the case of a special authority, the agent's power is directly derived from the principal, and limited accordingly.** This appears to be the fundamental distinction between the two kinds of authority. In practice, nevertheless, it often becomes a matter of difficulty to determine whether an authority is special or general. And in order to determine whether or not a principal is liable it may be necessary to consider first, whether the agent's authority was general or special; and secondly, whether his acts were within the apparent scope of his authority.

The distinction drawn by Lord Ellenborough between a general and special or particular authority is that the former imports not an unqualified authority, but an authority which is derived from a multitude of in-

stances, whereas the latter is confined to an individual instance.[1] The distinction drawn by Paley is that an authority is general or special with reference to its object, i. e., according as it is confined to a single act, or is extended to all acts connected with a particular employment.[2] Story adopts the same distinction. A special agency properly exists where there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment.[3]

In considering the extent of his authority it is not enough, under all circumstances, to ask whether the authority is general or special. We must learn whether the question at issue concerns the relative rights of the principal and agent only, or the principal and third parties. In the former case the answer to that question would mark out the limits of that authority; not so in the latter case.

Wherever a special agent or a general agent with a secret limit to his powers has been placed by his principal in a position where his apparent exceeds his real authority, the principal is not entitled to be relieved against any contract entered into merely upon the ground that he had previously instructed his agent not to enter into a contract except under certain circumstances, these circumstances being unknown to the other contracting party.[4]

The result of the cases is that—

(i) Third parties dealing with an agent who has merely a special or particular authority must make themselves acquainted with the limits of that authority.[5]

(ii) If they neglect to do so, and the agent exceeds his

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1. Whitehead v. Tuckett, 15 East, 408 (decided in 1812).

2. Paley on Agency, 2.

3. Story on Agency, sect. 17.

See the above distinction illustrated in the following cases: Beals v. Allen, 18 John. 363; Martin v. Farnsworth, 49 N. Y. (anno. reprint) 555; Ladd v. Town of Franklin, 37 Conn. 53; Gulick v. Grover, 33 N. J. Law, 463; Dart v. Hercules, 57 Ill. 446.

4. See Duke of Beaufort v. Neeld, 12 C. & F. 248, per Ld. Campbell, 290; Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222; Abbott v. Rose, 62 Me. 194; Cosgrove v. Ogden, 49 N. Y. (anno. reprint) 255.

5. Baxter v. Lamont, 60 Ill. 237; Weise's Appeal, 72 Penn. St. 351; Nat. Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

authority, the principal will not be bound, unless he is estopped, by his conduct, from pleading the actual terms of the authority; unless, for instance, he has held out the agent as possessing a larger authority than was actually conferred.[6]

CHAPTER II. [107]

POWERS PRIMA FACIE INCIDENT TO EVERY AUTHORITY.

SECT. 1. ***The necessary Means of executing the Authority with Effect.***

(A) Powers *prima facie* incident to every ascertained authority.

(a) All the necessary and usual means of executing the authority with effect.

[108] (b) All the various means justified by the usages of trade.

(c) Other powers contained in authorities of a particular kind.

(B) Of the construction of an agent's authority.

(a) When the authority is given by a formal instrument.

(b) When the authority is given by an informal instrument.

(c) When the authority arises from implication.

(d) When the instructions are ambiguous.

(C) Of the limits of an agents's authority.

(1) Of the extension of an agent's authority.

(a) By parole evidence: 1. Of custom and usage; 2. In other cases.

(b) By conduct of principal.

(2) Of the limitations of an authority.

1. As between principal and third parties; 2. As between principal and agent.

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6. See Smith's Merc. Law, ch. v. sect. 4; Story on Agency, sect. 126; Tiffany on Agency, 190 *et seq.*

There are certain powers incident to every authority unless the principal has taken the precaution of forbidding their exercise. Amongst such powers **are those which enable the agent to employ all the necessary and usual means of executing the principal authority with effect.**[1]

The principle is too well founded in reason to be questioned. The difficulty here, as in all cases where principles of law are well established, is to show that particular cases come within its operation. For instance, where an agent employed by the indorsees of a bill to get it discounted warranted the bill to be a good one, his principals were bound by the act, and were held liable to refund if the bill were afterwards dishonoured by the acceptor.[2] So, it is said, an authority to recover and receive a debt contains an authority to arrest the debtor.[3]

SECT. 2. *Means justified by the usages of Trade.*

The rule that an agent is empowered to use all the ordinary means justified by the usages of trade in executing his authority.[4] was well established long anterior to the decision of the King's Bench in Sutton v. Tatham,[5] in 1839.

The law is well settled that when a contract for the purchase and sale of shares has been entered into between individuals through their respective brokers, or with the intervention, as purchasers or their sellers, of jobbers, members

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1. Tiffany Agency, 174, and cases cited; Sprague v. Gillett, 9 Met. 91; First Nat. Bank v. Gay, 63 Mo. 33.

2. Fenn v. Harrison, 4 T. Rep. 177.

3. Per Curiam, Howard v. Baillie, 2 H. Bl. 618.

An authority given to an agent to collect a debt, carries with it the authority to sue for it and issue execution on the judgment obtained. Joyce v. Duplessis, 15 La. Ann. 242. See, also, De Poset v. Gusman, 30 La. Ann. 930; Boyd v. Corbitt, 37 Mich. 52; see, also, cases cited in notes to Evans Agency (Ewell's ed.), 144.

4. To the same point, see Upton v. Suffolk County Mills, 11 Cush. 586; Randall v. Kehlor, 60 Me. 37; Daylight Burner Co. v. Odlin, 51 N. H. 56; Shelton v. Merchants' Dispatch Transp. Co., 59 N. Y. (anno. reprint) 258; Sumner v. Stewart, 69 Penn. St. 321; Corbett v. Underwood, 83 Ill. 324. See, generally, as to the effect of custom and usage on contracts, Wigglesworth v. Dallison, Doug. 201; 1 Smith's Lead. Cas. (7th Am. ed.) 670, and notes.

5. 10 Ad. & E. 27. See the cases considered in the text and notes.

of the Stock Exchange, **the lawful usages and rules of the Stock Exchange are incorporated into and become part and parcel of all such contracts,** and the rights and liabilities of individuals, parties to any such contracts, are determined by the operation upon the contracts of these rules and usages.[6]

SECT. 3. *Powers contained in Authorities of a Particular Kind.*

The rule laid down in the old law books is, that if a man act differently from his authority, the act is void, as if his authority is to do any act upon condition, and he does it absolutely.[7] **Thus it was said that an authority to do an act in a particular way implied that the agent should do it in no other,** if any consequence might ensue from doing it in one way which might not ensue from doing in the other.[8] **This rule, however, as will be seen hereafter, must be taken subject to what is said with reference to the extent and limits of the authority.** But an authority to settle losses on a policy authorizes a reference of the matter to arbitration;[9] and an authority to effect a policy empowers the agent to adjust a loss under the policy, and [116] consequently to use all means necessary to procure an

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6. Per Kelly, C. B., in Bowring v. Shepherd, L. R., 6 Q. B. 309; Grissell v. Bristowe, L. R., 4 C. P. 36; Coles v. Bristowe, 4 L. R., Ch. 3; Wigglesworth v. Dallison, cited *ante.*

7. Co. Litt. 285a. See Drover v. Evans, 59 Ind. 454; Taylor v. White, 44 Iowa, 295.

8. 2 P. Wms. 19; Com. Dig. "Attorney," C. 13.

A special agent cannot bind his principal in a matter beyond or outside of the power conferred (actually or apparently), and the party dealing with a special agent is bound to know the extent of his authority. Blackwell v. Ketcham, 53 Ind. 184, and cases cited; Lumpkin v. Wilson, 5 Heisk. 555; Thornton v. Boyden, 31 Ill. 200; Schimmelpennich v. Bayard, 1 Pet. 264.

9. Goodson v. Brooke, 4 Camp. 163.

Authority to an agent "to settle" does not authorize him to submit to arbitration the matters in dispute. Huber v. Zimmerman, 21 Ala. 488; Scarborough v. Reynolds, 12 id. 252. In Scarborough v. Reynolds, the authority was in these words: "If you can honorably and fairly settle with Reynolds for me, out of court, do so; if not, let the court and jury settle."

An agent can not submit the cause of his principal to arbitration without express authority from his principal to do so. Mich. Cent. R. R. Co. v. Gougar, 55 Ill. 503. See *post.*

adjustment.[1] So, too, an authority to discount a bill or note implies an authority to indorse it in the name of the principal.[2]

With respect to an agent's implied authority to warrant, the [117] rule stated by Mr. Benjamin[3] is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual.[4] This is merely an application of the general rules already dwelt upon, to the effect that an agent has *prima facie* an implied authority to do all things which are necessary to the due execution of the authority or which are justified by usage.

Where an agent is authorized to receive money for his principal, he cannot allow it by way of set-off in accounts between the payer and himself; he must receive it in money.[5]

Authority may, of course, be inferred from conduct.

A broker who acted for the plaintiff made a contract for the sale of goods to the defendant. He sent a note to each party, but signed only that which was sent to the seller. The contract was entered in his book and duly signed. The defendant kept the note which was sent to him, and made no objection until [118] called upon to accept the goods. The court held that the conduct of the defendant amounted

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1. Richardson v. Anderson, 1 Camp. 43, n.

The agent who makes insurance for his principal, has authority to abandon without a formal letter of attorney. Chesapeake Ins. Co. v. Stark, 6 Cranch, 268; Lattomus v. Farmers' M. F. Ins. Co., 3 Houst. 404.

2. Fenn v. Harrison, 4 T. Rep. 177.

A general authority to transact business and to receive and discharge debts, does not authorize the agent to accept or indorse bills or to make accommodation paper. Hazeltine v. Miller, 44 Me. 177; Gulick v. Grover, 33 N. J. Law, 463. See notes to Evans Agency (Ewell's ed.), 164 *et seq.*

3. Sales of Personal Property (2d Am. ed.), § 624, p. 580.

4. Bayliffe v. Butterworth, 1 Ex. 425; Graves v. Legg, 2 H. & N. 210; 26 L. J., Ex. 316; Pickering v. Busk, 15 East, 38; Ahern v. Goodspeed, 72 N. Y. (anno. reprint) 108; Schuchardt v. Allens, 1 Wall. 359; Bryant v. Moore, 26 Me. 84, 87.

5. An agent who has only authority to receive payment of a debt, cannot bind his principal by any arrangement short of an actual collection of the money. Kirk v. Hiatt, 2 Ind. 322 (receipt of property); Drain v. Doggett, 41 Iowa 682 (receipt of a draft); Aultman v. Lee, 43 Iowa 404 (wheat);

to an admission that the broker had authority to make the contract for him.[6]

An authority to commit a breach of duty will not be implied; for instance, an agent has no implied authority to assign to others the exercise of a discretion. Accordingly, a provision in the deed of settlement of a joint-stock company, authorizing the directors to borrow on the security of the funds or property of the company, and to cause the funds or property, or property on the security of which any sums should be borrowed, to be assigned by way of mortgage, does not authorize the directors to mortgage future calls, which were, by the deed of settlement, to be made when it appeared necessary or expedient to the directors.[7]

An agent employed to purchase has no authority to buy his own goods; nor, on the other hand, may an agent employed to sell purchase his principal's goods for himself. A principal may either repudiate such transactions altogether, or he may adopt and take the benefit of them.[8] Again, an authority to sell for money does not authorize an agent to barter.[9] Nor does an authority to obtain orders for goods authorize an agent to receive payment for them, nor does an authority to sell at a particular place authorize their sale elsewhere;[1] nor, again, does an authority to sell stock authorize an agent to sell on credit;[2] nor, if the authority is to sell and transfer for the principal, will it

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Padfield v. Green, 85 Ill. 529; Woodbury v. Larned, 5 Minn. 339; McCulloch v. McKee, 16 Penn. St. 289 (where agent took a note to himself). See, also, Hall v. Storrs, 7 Wisc. 253.

6. Thompson v. Gardiner, L. R., 1 C. P. Div. 777.

7. *Ex parte* Stanley, *Re* British, &c. Society, 33 L. J., Ch. 535.

8. Bentley v. Craven, 18 Beav. 75. See this subject fully considered, *post*.

9. Guerreiro v. Peile, 3 B. & Ald. 616; Trudo v. Anderson, 10 Mich. 357; Kent v. Bornstein, 12 Allen 342. See *ante*.

1. Catlin v. Bell, 4 Camp. 183.

2. Wiltshire v. Sims, 1 Camp. 258.

As a general rule, an agent for a sale must sell for cash, unless he has an express authority to sell upon credit. State v. Delafield, 8 Paige 527 (public stocks of a state).

But an authority to sell on credit may be implied, where from the general usages of the trade in which the agent is employed, it is the custom to sell on credit. State v. Delafield, *supra*.

authorize a transfer by way of security for the agent's private debt.[3] An authority to buy for ready money is no authority to buy on credit,[4] nor is an authority to receive a payment in money an authority to receive a bill instead;[5] so, too, an attorney has an implied authority to enter into a compromise on his client's behalf,[6] and if the plaintiff in an action continues the authority of his attorney after judgment, the attorney retains the power to bind his client by a compromise.[7]

It may be laid down generally that the incidental authority flowing from the original authority must be so construed as not to confer a power different in kind from the power conferred by that original authority. In order, however, to apply this principle in all cases, we must understand that in the original authority here referred to is included not only the authority conferred by the actual terms in which the authority is given, but that authority extended and modified by the addition of all these powers which are by law implied from usage, mode of dealing, and other circumstances of a like character. Taking the word authority in this sense, it would be found that any act of the agent

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3. De Bouchout v. Goldsmith, 5 Ves. 211. An authority to an agent to sell goods does not authorize him to pledge them. Voss v. Robertson, 46 Ala. 483; Wheeler & Wilson Manfg. Co. v. Givan, 65 Mo. 89.

4. Show. 95; Stubbings v. Heintz, 1 Peake, N. P. 66; Stoddard v. McIlwain, 7 Rich. Law, 525.

5. Thorold v. Smith, 11 Mod. p. 2; Ld. Raym. 930.

6. Chown v. Parrott, 14 C. B., N. S. 74; Lush Pr. 256; Prestwich v. Poley, 18 C. B., N. S. 806.

7. Butler v. Knight, L. R., 2 Ex. 109.

In the United States, the weight of authority seems to be that an attorney, by virtue merely of his retainer as such, and without the consent of his client, has not the power to bind the client by the compromise of his client's claim or of a pending action. See Preston v. Hill, 50 Cal. 43; Spears v. Ledergerber, 56 Mo. 465; Maye v. Cogdell, 69 N. C. 93; Adams v. Roller, 35 Tex. 711; Derwort v. Soomer, 21 Conn. 245; Shaw v. Kidder, 2 How. 244; Stokeley v. Robinson, 34 Penn. St. 318; Barrett v. Third Ave. R. R. Co., 45 N. Y. (anno. reprint) 635; Vail v. Jackson, 13 Vt. 314; Marbourg v. Smith, 11 Kan. 562; Vickery v. McClellan, 61 Ill. 311; id. 446, 465. See, however, *contra*, Potter v. Parsons, 14 Iowa 286; Wieland v. White, 109 Mass. 392; Christie v. Sawyer, 44 N. H. 298. See notes, Evans Agency, 165.

which is not of a like kind with the acts sanctioned by such authority in the wider sense of the term, is beyond the scope of the agent's authority.[8]

CHAPTER III. [121]

IMPLIED AUTHORITY OF PARTICULAR CLASSES OF AGENTS.

SECT. 1. *The Authority of Auctioneers.*[1]

As a rule, one of two contracting parties cannot act as agent for the other, but in sales by auction the auctioneer is considered to be agent of both parties, so as to bind either the buyer or seller by his memorandum.[2]

An auctioneer has a possession coupled with an interest in goods which he is employed to sell; not a bare custody, like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction room.[3] The auctioneer has also a special property in such goods, with a lien for the charges of sale, commission, and the auction duty.[4] The catalogue and conditions may afford evidence that he has contracted personally, and so be liable for non-delivery of goods and the like.[5] A bidding may be withdrawn at any time before the lot is knocked down.[6]

An auctioneer has implied authority —

(a) To prescribe the rules of bidding and the terms of sale.[7]

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8. See notes *ante;* Tiffany Agency, 174; also notes to Evans Agency (Ewell's ed.), 166 *et seq.*

1. See, generally, Tiffany Agency, 225.

2. Morton v. Dean, 13 Met. 385; Pike v. Balch, 38 Me. 302, 311; McComb v. Wright, 4 Johns. Ch. 659; Pugh v. Chisseldine, 11 Ohio, 109; Johnson v. Buck, 35 N. J. Law, 338.

3. See Adams v. Scales, 57 Tenn. 337.

4. Williams v. Millington, 1 H. Bl. 81, 84, 85.

5. Woolfe v. Horne, 2 Q. B. Div. 355.

6. Warlow v. Harrison, 27 L. J., Q. B. 18; Payne v. Cave, 3 Term, 148.

7. Paley, by Lloyd, 257; Story on Agency, § 107.

(b) To bind his principal by his declarations made at the time of sale, provided such declarations are consistent with the written conditions.[8]

(c) To sue the buyer in his own name.[9]

[122] But he has no implied authority —

(a) To receive the purchase-money for land sold by him.[1]

(b) To employ another person to sell the property intrusted to him.[2]

(c) To sell on credit.[3]

(d) To allow the contract to be rescinded.[4]

(e) To sell by private contract.[5] It is no excuse that he has acted without fraud, and obtained a larger sum than the price fixed.[6]

(f) To buy property which he is commissioned to sell.[7]

SECT. 2. *The Authority of Brokers.*[8]

A broker has implied authority —

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8. Ibid.; Gunnis v. Enhart, 1 H. Bl. 289. See Poree v. Bonneval, 6 La. Ann. 386; Wright v. Deklyne, Pet. C. C. 199; Rankin v. Matthews, 7 Ired. Law, 286; Satterfield v. Smith, 11 id. 60.

In The Monte Allegre, 9 Wheat. 647, Thompson J., lays down the rule that "sales at auction, in the usual mode, are never understood to be accompanied by a warranty. Auctioneers are special agents, and have only authority to sell, and not to warrant, unless specially instructed so to do."

At judicial sales and sales for taxes, the maxim *caveat emptor* applies, and no warranty can be implied. Yates v. Bond, 2 McCord, 382; Bashore v. Whisler 3 Watts, 490; Blackwell on Tax Titles (4th ed.), 51, 65, 442, note, and cases cited.

9. Story on Agency, ibid. Hulse v. Young, 16 Johns. 1; Minturn v. Main, 7 N. Y. 220; Tyler v. Freeman, 3 Cush. 261; Thompson v. Kelly, 101 Mass. 291.

1. Sykes v. Giles, 5 M. & W. 645. See, also, Williams v. Evans, L. R., 1 Q. B. 352. See, however, Pinkney v. Hagadorn, 1 Duer, 90.

2. Blore v. Sutton, 3 Mer. 237; Coles v. Trecothick, 9 Ves. jun. 254; Commonwealth v. Harnden, 19 Pick. 482.

He may, however, employ all necessary clerks and servants, and relieve himself by employing others to use the hammer and make the outcry. But this should be done under his immediate direction and supervision. Commonwealth v. Harnden, *supra*.

3. Williams v. Millington, 1 H. Bl. 81; Townes v. Birchett, 12 Leigh, 173.

4. Nelson v. Aldridge, 2 Stark. 435; Boinest v. Leignez, 2 Rich. Law, 464.

5. Wilkes v. Ellis, 2 H. Bl. 555.

6. Daniels v. Adams, Amb. 495.

7. See Tate v. Williamson, L. Rep., 2 Ch. 55.

8. See, generally, Tiffany Agency, 224.

(a) To sign the bought and sold note, and so bind both parties.[9]
(b) To sell on credit in the absence of a usage to the contrary.[1]
(c) To adjust a policy if employed to subscribe it.[2]

The authorities are conclusive to show that a broker acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both; but the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract, and the signed entry in the broker's book is a sufficient memorandum of the bargain to satisfy the Statute of Frauds.[3]

A broker has no implied authority —

(a) To buy or sell in his own name.[4] The case of an insurance broker is an exception to this rule; he need not even state that he contracts as a broker.[5]
(b) To receive payment for goods sold for his principal.[6] [123] But an insurance broker has authority to receive payment of any loss that may occur on a policy effected by him, if the instrument remains in his lands.[7]
(c) To make freight under a charter-party entered into by him for his principal, payable to himself.[8]
(d) To delegate his authority.[9]

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9. Parton v. Crofts, 16 C. B., N. S. 11; Saladin v. Mitchell, 45 Ill. 79.

1. Boorman v. Brown, 3 Q. B. 511; Wiltshire v. Sims, 1 Camp. 258.

2. Richardson v. Anderson, 1 Camp. 43, note (*a*).

3. Thompson v. Gardiner, L. R., 1 C. P. Div. 777; Coddington v. Goddard, 16 Gray, 436.

A broker employed to sell lands has no implied authority to sign a contract of sale in behalf of his principal. Morris v. Ruddy, 20 N. J. Eq. 236; Coleman v. Garrigues, 18 Barb. 60; Glentworth v. Luther, 21 id. 145; Roach v. Coe, 1 E. D. Smith, 175.

4. Baring v. Corrie, 2 B. & Ald. 137; Saladin v. Mitchell, 45 Ill. 79.

5. DeVignier v. Swanson, 1 B. & P. 346, note b.

6. Campbell v. Hassell, 1 Stark. 233; Graham v. Duckwall, 8 Bush, 12; Saladin v. Mitchell, 45 Ill. 79, 84; Higgins v. Moore, 34 N. Y. (anno. reprint) 417.

7. Shee v. Clarkson, 12 East, 507.

8. Walshe v. Provan, 8 Ex. 843.

9. Henderson v. Barnwell, 1 Y. & Jer. 387.

(e) To pay losses for the underwriters who employ him.[1]
(f) [To bind his principal by a submission to arbitration.][2]

SECT. 3. *The Authority of Factors.*[3]

A factor has implied authority —

(a) To sell in his own name.[4]
(b) To sell upon reasonable credit.[5]
(c) To warrant.[6]
(d) To receive payment and give recepts.[7]
(e) To ensure consignments on behalf of his principal.[8]
Probably he may insure in his own name.[9]

A factor has no implied authority —

(a) To barter his principal's goods.[1]
(b) At common law, to pledge the goods intrusted to him.[2] This rule still holds good except as far as it is modified by statute law.
(c) To delegate his authority.[3]

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1. Bell v. Auldjo, 4 Doug. 48.

2. Ingraham v. Whitmore, 75 Ill. 24.

3. See, generally, Tiffany Agency, 223 *et seq.*

4. Baring v. Corrie, 2 B. & Ald. 137; Graham v. Duckwall, 8 Bush, 12.

5. Houghton v. Matthews, 3 B. & P. 489; Daylight Burner Co. v. Odlin, 51 N. H. 59; Hapgood v. Batcheller, 4 Met. 576; Greely v. Bartlett, 1 Me. 178; Van Alen v. Vanderpool, 6 John. 70.

6. Pickering v. Rusk, 15 East, 38, 45, per Bailey, J.; Randall v. Kehlor, 60 Me. 37; Schuchardt v. Allens, 1 Wall. 359.

7. Drinkwater v. Goodwin, Cowp. 256.

8. Lucena v. Crawford, 2 B. & P. N. R. 269.

9. See 1 Arnould, Insurance, 301; Waters v. Monarch Fire Assurance Co., 5 Ell. & Bl. 870; Johnson v. Campbell, 120 Mass. 449.

Emergencies may arise in which an agent or a factor may, from the necessities of the case, be justified in assuming extraordinary powers, and his acts fairly done under such circumstances bind the principal. Acts done in the *bona fide* efforts to save perishing property (heated grain in this case), come within the rule. Jervis v. Hoyt, 2 Hun, 637; s. c. 5 Thomp. & C. 199; Greenleaf v. Moody, 13 Allen, 363.

1. Guerreiro v. Peile, 4 B. & Ald. 616.

2. Bott v. McCoy, 20 Ala. 578; Laussatt v. Lippincott, 6 S. & R. 386; First Nat. Bank v. Nelson, 38 Geo. 391; Macky v. Dillinger, 73 Penn. St. 85; Rodriguez v. Heffernan, 5 Johns. Ch. 429.

3. Cockran v. Irlam, 2 M. & S. 301; Loomis v. Simpson, 13 Iowa, 532.

(d) To receive payment in any other than the usual mode.[4]

[124] (e) To compound the debt, or receive a composition in discharge.[5]

(f) To accept or indorse bills on behalf of his principal.[6]

SECT. 4. *The Authority of Masters of Ships.*

As regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master's authority is that conferred by the law of the flag, and is limited by that law.[7]

The master of a ship has an implied authority —

(a) To enter into lawful contracts relative to the usual employment of the ship.[8]

(b) To give a warranty in such contracts.[9]

(c) To enter into contracts for repairs and necessaries to the ship.[1]

(d) To hypothecate the ship, freight and cargo,[2] if such a step is necessary, *i. e.*, provided the master cannot obtain personal credit,[3] and provided the hypothecation is made in order to meet a high degree of need — a need which arises when choice

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4. Underwood v. Nicholl, 17 C. B. 239.

5. 3 Chitty Com. and Man. 208, cited Russell, Merc. Ag. 48.

6. Hogg v. Snaith, 1 Taunt. 247; Murray v. East India Company, 5 B. & Ald. 204.

7. Lloyd v. Guibert, L. Rep. 1 Q. B. 115.

8. Maclachlan's Merchant Shipping, p. 123; Boson v. Sandford, 1 Show. 29, 101; Ellis v. Turner, 8 T. R. 531.

The master of a vessel cannot by the mere virtue of his office, as such, bind the owners by a charter party under seal, so as to subject them to an action of covenant. Pickering v. Holt, 6 Me 160.

Nor has the master of a steamboat any authority, as master, to bind the owners by indorsing or making bills or promissory notes. Gregg v. Robbins, 28 Mo. 347 (for services as pilot); Holcroft v. Holbert, 16 Ind. 256.

9. Ibid., p. 129.

1. Hussey v. Christie, 9 East, 426; Hoskins v. Slapton, Hardw. 376; Provost v. Patchin, 9 N. Y. (anno. reprint) 235; James v. Bixby, 11 Mass. 34; Winsor v. Maddock, 64 Penn. St. 231.

2. The Trident, 1 W. Rob. Ad. 29.

3. Heathorn v. Darling, 1 Moo. P. C. 8; The Ship Fortitude, 3 Sumn. 228.

is to be made of one of several alternatives, under the peril of severe loss if a wrong choice should be made.[4]

Upon this cardinal principle, that necessity is the foundation of the master's authority,— several limitations of that authority have been established, which have been stated by Sir Robert Phillimore to the following effect: —

(1) The master must endeavour to raise funds on the personal credit of the owners.
(2) The money must be raised to defray the expense of necessary supplies or repairs of the ship, or to enable the ship to leave the port in which he gives the bond, and to carry the cargo to its destination.
(3) The money must have been advanced in contemplation of a bottomry security, or, in other words, upon the security of the ship.[5]
(4) To sell the cargo, provided he establishes —
  (i) A necessity for the sale.
  (ii) Inability to communicate with the owner, and obtain his directions.

Under these conditions, and by the force of them, the master becomes the agent of the owner, not only with the power but under the obligation within certain limits, of acting for him; but he is not in any case entitled to substitute his own judgment for the will of the owner where it is [127] possible to communicate with the owner, and ascertain his will.[6]

(e) To sell the ship; but this authority is conditional on the existence of a twofold necessity, namely, inability to prosecute the voyage, and an immediate necessity to sell.[7] What may be a sufficient reason

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4. Reg. v. Winsor, L. Rep., 1 Q. B. 394; The Karnak, L. Rep., 2 P. C. 512.

5. The Alexander, 1 Dodson, 278.

6. The Australian Steam Navigation Company v. Morse, L. Rep., 4 P. C. 222.

In case of necessary repairs, the master may sell part of the cargo, or hypothecate it. The Ship Packet, 3 Mason C. C. 255; Am. Ins. Co. v. Coster, 3 Paige, 323.

7. See Maclachlan Marit. Ship. 154, and cases cited.

for not continuing the voyage will not necessarily be a sufficient reason for the sale of the ship, *e. g.*, want of funds, or inability to execute repairs on the spot.[8]

(f) To borrow money on the security of the cargo for the purpose of the cargo only, *i. e.*, on *respondentia*.[9]

(g) To give a creditor a right *in rem*, in cases other than bottomry bonds and *respondentia;* as, for instance, to draw a bill of exchange upon the shipbroker for necessaries supplied in a colonial port, so as to enable the shipbroker to proceed against the ship as for necessaries supplied in default of payment of the amount due by the shipowner, the master being otherwise unable to obtain credit.[1]

The master of a ship has no implied authority —

(a) To agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters.[2]

[128] (b) To give a bottomry bond:

1. For necessaries already supplied, unless such bond had been stipulated for previous to the supply of the necessaries.[3]
2. For his own debt.[4]
3. To free himself from arrest.[5]
4. For general average charges.[6]
5. To free the ship from detention.[7]

(c) To mortgage the ship or to assign the freight.[8]

(d) To bind the ship or cargo to ransom either from the enemy.[9]

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8. Hunter v. Parker, 7 M. & W. 322.

9. Cargo ex Sultan, 5 Jur., N. S. 1060; The Glenmanna, Lush. 115; Maclachlan, p. 150.

1. The Anna, 34 L. T. Rep., N. S. 895; L. Rep., 1 Prob. Div. 253.

2. Burgon v. Sharpe, 2 Camp. 529.

3. The Heresy, 3 Hagg. Ad. 404; and see The Lochiel, 2 W. Rob. 34.

4. Dobson v. Lyall, 8 Jur. 969.

5. Smith v. Gould, 4 Moo. P. C. 21.

6. The North Star, 1 Lush. 45.

7. But see per Curiam in The Karnak, L. Rep., 2 A. & E. 289.

8. Willis v. Palmer, 29 L. J., C. P. 194.

9. 22 Geo. 3, c. 25, ss. 1, 2.

(e) To sell the whole of the cargo for the purpose of repairing the ship; but he may sell part.[1]

A master cannot legally give a bond on cargo alone, or on ship and cargo without freight; or, if he does so, the ship and freight must be exhausted before recourse can be had to the cargo.[2]

SECT. 5. *As to the Authority of Partners.*[3]

The general rule is, that the act or contract of one partner with reference to and in the ordinary course of the partnership business is the act or contract of the whole firm, and binding on them.[4]

The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must be determined by the nature of the business, and by the practice of persons engaged in it. No answer of any value can be given to the abstract question — Can one partner bind his firm by such and such an act? Unless, having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever; there are very few [129] acts of which any such assertions can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business but not in another.[5]

SECT. 6. *The Authority of Solicitors.*

A solicitor may act under a general or special retainer.

A solicitor acting under a general retainer has an implied authority to accept service of process and appear for the client, but he has no such authority to commence an action

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1. Duncan v. Benson, 1 Ex. 555; The Gratitudine, 3 C. Rob. 242.

2. Per Sir Robert Phillimore, The Karnak, L. Rep., 2 A. & E. 309.

3. See *post*, Partnership.

4. Hawkins v. Bourne, 8 M. & W. 703, 710; Fox v. Clifton, 6 Bing. 775, 795. See Collyer on Part. (5th Am. ed.) § 195; Pars. on Part. *95.

5. 1 Lindley on Partnership, 251. See *post*, Partnership.

unless such an authority may be reasonably inferred from the terms which were used in the retainer.[6]

As between the client and the opponent, the former is bound by every act of his solicitor done in the ordinary course of practice (provided there is no collusion of fraud), whether it is authorized or not.[7] Thus, if a solicitor pleads an improper plea, or brings the action in an improper

6. Lush's Practice, vol. 1, 129; Chitty's Practice, vol. 1, 86; Anderson v. Watson, 3 C. & P. 214.

To the point that an appearance in an action by a regularly admitted and licensed attorney is presumed to be authorized by the party whom he assumes to represent, see Beckley v. Newcomb, 24 N. H. 359; Leslie v. Fischer, 62 Ill. 118; Hays v. Shattuck, 21 Cal. 51; Hamilton v. Wright, 37 N. Y. (anno. reprint) 502; Osborn v. U. S. Bank, 9 Wheat. 738; Pillsbury v. Dugan, 9 Ohio, 117; Thomas v. Steele, 22 Wis. 207; Proprietors, etc. v. Bishop, 2 Vt. 231.

An attorney who tried a cause in the court below is not authorized to appear in the appellate court without a new retainer. Covill v. Phy, 34 Ill. 37.

But by the weight of authority, the authority of an attorney employed to collect a claim does not cease with the obtaining judgment, but continues until the purposes of the judgment are obtained; and that in pursuing that object, he may be regarded as authorized to collect the judgment by all the usual methods, and to use the usual means for that purpose. Willard v. Goodrich, 31 Vt. 597; Jenney v. Delesdernier, 20 Me. 183, 193, and cases cited; Scott v. Seiler, 5 Watts, 235; Erwin v. Blake, 8 Pet. 18; Read v. French, 28 N. Y. (anno. reprint) 285; Lynch v. Commonwealth, 16 S. & R. 388; Day v. Wells, 31 Conn. 344; Smyth v. Harvie, 31 Ill. 62; White v. Johnson, 67 Me. 287; Weeks on Att'ys, p. 414.

7. To the point that in all the ordinary incidents of an action the attorney has full control of the case and is under no obligation to consult his client as to such incidents, see Board of Commissioners v. Younger, 29 Cal. 147; McConnell v. Brown, 40 Ind. 384; Edgerton v. Brackett, 11 N. H. 218; Simpson v. Lombas, 14 La. Ann. 103; Ward v. Hollins, 14 Md. 158; Clark v. Randall, 9 Wis. 135; Moulton v. Bowker, 115 Mass. 36; Monson v. Hawley, 30 Conn. 51; Jenney v. Delesdernier, 20 Me. 183.

The attorney of record has the exclusive management and control of the case, and neither the party nor his agent or attorney in fact have any authority to sign stipulations in the case; and if they do, such stipulations will be disregarded by the court. Mott v. Foster, 45 Cal. 72; Board of Commissioners v. Younger, 29 id. 147; Nightingale v. Oregon Central R'y Co., 2 Sawy. 338; Anon. 1 Wend. 108.

Counsel in a suit is not authorized to represent his client except in the argument or hearing before the court. Nightingale v. Oregon Central R'y Co., *supra*.

form;[8] or waives a judgment by default;[9] or admits a fact to prevent the necessity of proving it at the trial;[1] or sues out an irregular writ, whereby trespass is committed,[2] the act binds the client.[3]

In all those cases where the solicitor, through acting negligently or against his instructions, binds his client to other [130] parties, the solicitor of course may be liable to the client for the consequence of his negligence or breach of duty.[4]

CHAPTER IV.

[136] OF THE LIMITS OF AN AGENT'S AUTHORITY.

SECT. 1. *Of the Extension of the Authority.*

The authority with which an agent is invested **is not necessarily confined to the performance of those actions alone which are authorized by the bare words in which an authority is conveyed. On the contrary, it is rarely so confined. Generally speaking, the authority may be extended in a variety of ways** by the operation of a number of rules and principles, some of which have already been discussed. There now remains for consideration **the influence of the principal's conduct in extending the original authority.**

The only ground of liability on the part of a principal to third parties dealing with an agent, for the acts of the agent

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8. Payne v. Chute, 1 Roll. 365.

9. La Tuch v. Pacherante, 1 Salk. 86.

1. Blackstone v. Wilson, 26 L. J., Ex. 229.

2. Parsons v. Lloyd, 3 Wils. 341.

3. "*If an attorney sues out an illegal writ, the party for whom he acts is so far identified with him in the proceedings that he is responsible for what is done under it; but the plaintiff is not responsible for any illegal action taken or directed by the attorney which the plaintiff did not advise, consent to, or participate in, and which was not justified by any authority he had given.*" Cooley on Torts, 131, and cases cited.

4. As to the general law respecting attorneys, see Weeks on Att'ys (1892); Thornton on Att'ys (2 vols., 1914). See, also, notes to Evans Agency (Ewell's ed., Chicago), 182, *et seq.*; Tiffany Agency, 227.

done in excess of the power given him, and which he would be held to have even in a question between himself and the principal, is such **culpa or quasi-culpa on the principal's part as would be a relevant ground for the plea of estoppel** against [137] his pleading the actual terms of the authority given to the agent. **Where the principal by his words or conduct wilfully causes another to believe the existence of certain powers in the agent, and induces him to deal with the agent in that belief; where the principal has by words or by conduct made a representation to another as to the agent's authority in order to induce others to act upon it; and where the representation or conduct complained of, whether active or passive in its character, has been intended to bring about the result whereby that other dealing with the agent has altered his position to his loss — in such a case, and in such a case alone, will the doctrine of estoppel apply** to bar the principal from pleading against the third party the terms of the real authority which he gave to the agent.[1] Mere negligence is not of itself a ground of estoppel.[2]

The question to be considered, so far as the liability of the principal to third parties is concerned, is whether the agent's act is within the scope of his authority.[3] Thus, where the agent of a wharfinger, whose duty is was to give receipts for goods actually received at the wharf, fraudu-

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1. See Rice v. Groffman, 56 Mo. 434; Johnson v. Jones, 4 Barb. 569; Kasson v. Noltner, 43 Wis. 646; Schimmelpennich v. Bayard, 1 Pet. 264; Farmers' Mut. Ins. Co. v. Taylor, 73 Penn. St. 342; Bigelow on Estoppel (2d ed.), 434, and cases cited.

Although an agent's authority may be special and limited, or even though he may have no actual authority, yet if the principal allows him to hold himself out to the public as his agent generally, without noting such limitation, and the agent acts outside of his actual authority, the principal will be bound thereby, unless the party with whom he deals had notice of the limitation, or want of authority. St. Louis & M. Packet Co. v. Parker, 59 Ill. 23; Kerslake v. Schoonmaker, 3 Thomp. & C. 524; s. c., 1 Hun, 436; Gallup v. Lederer, 3 Thomp. & C. 710; s. c., 1 Hun, 282.

2. Bell, Commentaries, iii, I, 3, n. 5.

3. See Taylor v. Chicago & N. W. R'y Co., 74 Ill. 86; Fletcher v. Sibley, 124 Mass. 226; Kennedy v. Otoe County Nat. Bank, 7 Neb. 59; Saveland v. Green, 40 Wis. 431; Locke v. Stearns, 1 Met. 560.

lently gave a receipt for goods which had never been received, the principal was not held to be responsible, because it was not within the scope of the agent's authority in the course of his employment to give such a receipt.[4]

SECT. 2. *Limitations of an Agent's Authority.*

In considering the true limits of the authority of an agent a distinction must be made. **Questions may arise either between a principal and third parties who have dealt bona fide with the agent of that principal, or between the principal and the agent. The construction of the authority will be different in each of those cases respectively.** In the former case, the true limit of the agent's power to bind the principal will be the apparent authority with which the agent is invested;[5] in the latter case, the true limit of his authority will be marked by the express authority or instructions given to the agent; nor will it be extended by the addition of any implied powers inconsistent with such authority and instructions.[6]

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4. Coleman v. Riches, 24 L. J., C. P. 125.

5. See Kasson v. Noltner, 43 Wis. 646; Taylor v. Chicago & N. W. R'y Co., 74 Ill. 86; Adams Express Co. v. Schlesinger, 75 Penn. St. 246; Smith v. Peoria County, 59 Ill. 412; and note 1, p. 140.

6. See Allen v. Suydam, 20 Wend. 321; Wilson v. Wilson, 26 Penn. St. 393; Williams v. Higgins, 30 Md. 404; Sawyer v. Mayhew, 51 Me. 398.

[145] CHAPTER V.

OF THE CONSTRUCTION OF AN AGENT'S AUTHORITY.[1]

SECT. 1. *Where the Authority is given by a Formal Instrument.*

When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to:

1. The meaning of general words in the instrument will be restricted by the context, and construed accordingly.
2. The authority will be construed strictly so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.[2]

[149] SECT. 2. *Where the Authority is Ambiguous.*

When the instructions given to an agent are clear and defined, his duty is to observe them faithfully. He will not be allowed to violate them in any particular, provided they may be lawfully carried out. On the other hand, **if the instructions are given in such uncertain terms as to be susceptible of two different meanings, and the agent bona fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the instructions or orders to be read in the other sense of which they are equally capable.** It is a fair answer to such an attempt to disown the agent's authority to tell the principal that the departure from his intention was

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1. A large collection of maxims and rules of interpretation will be found in *Blackwell on Tax Titles*, *606 *et seq.* Brown's Legal Maxims is, also, a book of good value to the student.

2. Bissell v. Terry, 69 Ill. 184; Wood v. Goodridge, 6 Cush. 117, 123; Brantley v. Southern Life Ins. Co., 53 Ala. 554; Cringhead v. Peterson, 72 N. Y. (anno. reprint) 279.

occasioned by his own fault, and that he should have given his order in clear and unambiguous terms.[3]

SECT. 3. *Where the Authority is conferred by Informal Writing or arises by Implication.*

The rules under this head may be briefly summarized.

(a) **A written instrument will be so construed as to give authority to do only such acts as are within the scope of the particular matter to which the instrument refers.**[4]

(b) **Where orders and instructions are free from ambiguity, they will be construed according to their obvious meaning.** As to the rules where they are not, see section 2 of this chapter. The construction of mercantile instruments and instructions may be **guided by the usages of trade**; and for that purpose the evidence of persons conversant with mercantile affairs is received.[5]

(c) With reference to the construction of an authority which arises by implication, see Book II, Part I, Chap. II.

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[153] CHAPTER VI.

ADMISSIONS AND DECLARATIONS BY AGENTS.

As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. **An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts.** What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must

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3. Per Lord Chelmsford in Ireland v. Livingstone, L. Rep., 5 H. L. 416; National Bank v. Merchants' Bank, 91 U. S. 92, 104.

4. Story's Agency, s. 69. See sect. 1 of this chapter.

5. Paley, by Lloyd, 198; Story, ss. 75, 77.

be admitted to prove that the agent made a certain statement. So with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. Nevertheless the admission of the agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it; but it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct, or his agreement, merely because that person has been an agent of his.[1] **An agent can act only within the scope of his authority; hence declarations or** [154] **admissions made by him as to a particular fact are not admissible as evidence against the principal, unless they fall within the nature of the agent's employment as agent;** unless, for instance, they form part of the contract which he has entered into and is employed to negotiate on behalf of the principal.[2] Hence, what is said by an agent representing a contract or other matter in the course of his employment, is good evidence to affect the principal, but not if it is said on another occasion.[3]

The result of the cases appears to be that if it is shown that an admission has been made by an agent acting in a matter within the scope of his authority, and that it is a part of the *res gestae,* and does not relate to bygone transactions, then such admission is receivable in evidence against the principal, and the agent himself need not be called.[4] Admissions or declarations of an agent cannot, of course, be received if there is no sufficient proof of agency.[5]

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1. Per Sir William Grant, M. R., Fairlie v. Hasting, 10 Ves. 123, 126.

2. Betham v. Benson, Gow. 45.

3. Peto v. Hague, 5 Esp. 134.

4. Corbin v. Adams, 6 Cush. 95; La Fayette & Ind. R. R. Co. v. Ehman, 30 Ind. 83; Anderson v. Rome, Watertown & O. R. R. Co., 54 N. Y. (anno. reprint) 334; Willard v. Buckingham, 36 Conn. 395. See notes, Evans Agency (Ewell's ed.), 217, *et seq.*

5. Reynolds v. Ferree, 86 Ill. 570.

But the error of admitting such declarations or admissions, before the proper foundation has been laid, is cured by subsequent proof of his agency. Rhodes v. Lowry, 54 Ala. 4.

CHAPTER VII. [159]

THE DOCTRINE OF CONSTRUCTIVE NOTICE.

The following principles appear to be deducible from the cases:

(1) **As to knowledge acquired by an agent during his employment as agent.** It is well settled, and is universally true, that a principal is affected with constructive notice of all such knowledge,[1] provided the knowledge is of facts which are material to the transaction in which the agent is employed, and which it was the duty of the agent to communicate.[2]

(2) **As to knowledge acquired by an agent otherwise than in the business for which he was employed.** In [165] commercial transactions the knowledge of the agent, however acquired, is the knowledge of the principal.[3] Where the same solicitor is employed by a vendor and purchaser, the latter will be affected with constructive notice of the knowledge possessed by the solicitor, although that knowledge was acquired before the retainer by the purchaser.[4] It is assumed, however, that in both

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1. Fuller v. Bennett, 2 Ha. 294, and cases there quoted; Wyllie v. Pollen, 32 L. J. Ch. 782; Boursot v. Savage, L. R. 2 Eq. 134.

2. Wyllie v. Pollen, L. R. 2 Eq. 142; Jones v. Smith, 1 Ph. 244.

3. Dresser v. Norwood, 14 C. B., N. S. 574; in error, 17 ibid. 466.

4. Fuller v. Bennett, 2 Ha. 394.

The rule is generally stated to be that notice to an agent, of any fact connected with the business in which he is employed, is notice to the principal. Wade on Notice, § 672; Bracken v. Miller, 4 W. & S. 102; Astor v. Wells, 4 Wheat. 466; Reed's Appeal, 34 Penn. St. 207; Jackson v. Sharp, 9 Johns. 162; Jackson v. Leek, 19 Wend. 339; Mechanics' Bank v. Seton, 1 Pet. 309; Sterling Bridge Co. v. Baker, 75 Ill. 139.

But the principal will not be affected by notice to the agent of any fact outside the scope of his agency. Roach v. Karr, 18 Kan. 529; Adams Exp. Co. v. Trego, 35 Md. 47; Congar v. C. & N. W. R'y Co., 24 Wis. 157; Smith v. Water Commissioners, 38 Conn. 208; Wells v. Am. Exp. Co., 44 Wis. 342.

these cases the knowledge acquired must be material to the transaction for which the solicitor or other agent is employed.

(3) **When it is sought to fix a purchaser with constructive notice,** the question is whether the not obtaining the knowledge was an act of culpable negligence on the part of his agent, and not whether the agent had the means of obtaining that knowledge.[5]

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[166] **BOOK II.— PART II.**

CHAPTER I.

OF THE EXECUTION OF THE AUTHORITY GENERALLY.

In considering whether the contract of an agent is binding upon his principal, a twofold inquiry arises. In short —

(a) **He may execute an authority strictly,** or with only a circumstantial variance;[1] or
(b) **He may act entirely without authority**; or
(c) Having authority, he **may do something in excess in executing his authority, or he may do less than** his authority justifies.

If an agent strictly observes his authority, it will depend upon the form and construction of the contract into which he enters, [167] whether his act will bind his principal and not himself. Although an act varying in substance from the authority is void so far as the principal is concerned,[2] yet there are a number of cases in which an authority will be deemed to be properly executed though it is not strictly pursued. Thus, if executors have authority to sell land, and one of them refuse, the others may sell[3] or if one dies.[4]

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5. Ware v. Lord Egmont, 4 De G., M. & G. 460. See, generally, as to notice, Wade on Notice, § 687, and cases cited.

1. Com. Dig. "Attorney," c. 15.
2. Com. Dig. "Attorney," c. 13.
3. Co. Litt. 113a.
4. R. Cro. Car. 382.

It is sufficient if the words and intent of the authority are generally pursued.

The correct principle is undoubtedly that laid down by Chief Justice Holt, who delivered the opinion of the court in Parker v. Kett,[5] 1701, where it is laid down **that a circumstantial variation in the execution of an authority is not material.**

As to the second class of cases, the rule is that a person who enters into a contract as agent, and without authority, renders himself liable.[6]

As to the third class of cases, one of the earliest authorities is contained in Lord Coke's "Commentary upon Littleton," where it is said: "**Regularity, it is true, that where a man doth less than the commandment or authority committed unto him, there (the commandment or authority being not pursued) the act is void. And when a man doth that which he is authorized to do, and more, there it is good for that which is warranted, and void for the rest: yet both these rules have divers exceptions and limitations.**"[7] The summary of the law by Sir Thos. Clarke, in Alexander v. Alexander,[8] is to the effect that where there is a complete execution of a power and something *ex abundanti* added, which is improper, there the execution is good, and only the excess is void; but where there is not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad.

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5. 1 Salk. 95.

6. See Book III,, Chap. IV, *post*.

7. Co. Litt. 258a.

8. 2 Ves. 644.

If a contract which need not be under seal, is executed by an agent having authority to execute simple contracts, but not sealed contracts, and has a seal affixed to it, it will be valid as a simple contract. Dickerman v. Ashton, 21 Minn. 538. See, also, Stowell v. Eldred, 39 Wis. 614; Evans v. Wells, 22 Wend. 341. See, generally, as to the execution of powers, Sugd. on Powers, ch. 6.

[171] CHAPTER II.

OF THE EXECUTION OF AUTHORITY BY INSTRUMENT UNDER SEAL.

In executing his authority an agent must take care so to execute it as not to render himself personally liable. It will be convenient to consider the authorities in the following order:

A. **Instruments under seal.**
B. **Instruments other than deeds.**
   1. Bills of exchange.
   2. Promissory notes.
   3. Charter-parties not under seal.
   4. Bought and sold notes.
C. **In other cases.**

First as to deeds. **A duly authorized agent may so execute a deed that —**

(a) It will bind the principal, and not himself; or
(b) It will bind himself, and not the principal; or
(c) It will be void.

A deed will bind the principal if executed in his name and on his behalf, and this fact appears on the face of the instrument.[1] As to the signature, sealing, and delivering, a rule has been laid down in an early case for the guidance of the agent. If A. B. duly authorize C. D. to execute a deed for him, C. D. may do this either by writing "A. B. by C. D., his attorney," or by writing " C. D., for A. B.," provided he delivers the instrument as the deed of A. B.[2]

[172] If an agent makes himself a contracting party he will be liable on the deed, although he may profess in the

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1. In order to bind the principal by an instrument under seal, the instrument must purport to be made and sealed in the name of the principal. Echols v. Cheney, 28 Cal. 157; Lutz v. Linthicum, 8 Pet. 165; Stinchfield v. Little, 1 Greenl. 231; Stone v. Wood, 7 Cow. 452; Fullam v. West Brookfield, 9 Allen 1; Townsend v. Corning, 23 Wend. 435; Briggs v. Partridge, 64 N. Y. (anno. reprint) 358.

2. Wilks v. Back, 2 East, 142.

instrument to contract on behalf of a third party.[3] The main question to be decided in all these cases is this: Do the terms of the instrument disclose a personal undertaking or not?

CHAPTER III. [176]

OF THE EXECUTION OF PAROL CONTRACTS.

SECT. 1. *The drawing and accepting Bills of Exchange.*

[177] It is assumed in this and the following summaries, that the agent has full authority to contract on behalf of his principal.

(a) If a bill is addressed to a principal and accepted by his agent on behalf of that principal, the principal and not the agent will be liable as acceptor.[1]

(b) If the bill is drawn upon an agent in a personal character, he will be liable as acceptor, although he accepts for or on behalf of his principal.[2]

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3. Where the deed purports to be made by the agent and to be sealed by him, and not to be made and sealed by his principal, the agent will be personally liable, and the description of himself as agent will not exclude his personal responsibility. Lutz v. Linthicum, 8 Pet. 165; Stinchfield v. Little, 1 Greenl. 231; Fullam v. West Brookfield, 9 Allen, 1; Duvall v. Craig, 2 Wheat. 45; White v. Skinner, 13 John. 307; Tippets v. Walker, 4 Mass. 595; Quigley v. De Hass, 82 Penn. St. 267; Kiested v. Orange & A. R. R. Co., 69 N. Y. (anno. reprint) 343.

1. Halford v. The Cameron, &c. Co., 16 Q. B. 442.

Judge Story in his valuable work on Agency (§ 155) says: "If, from the nature and terms of the instrument, it clearly appears not only that the party is an agent, but that he means to bind his principal, and to act for him, and not to draw, accept, or indorse the bill on his own account, that construction will be adopted, however inartificial may be the language, in furtherance of the actual intention of the instrument. But if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity;" and the general rule does not seem susceptible of more accurate and definite statement. See Stackpole v. Arnold, 11 Mass. 29; Mills v. Hunt, 20 Wend. 431. See notes, Evans Agency (Ewell's ed.), 248, *et seq.*

2. Thomas v. Bishop, 2 Str. 955; Nichols v. Diamond, 9 Ex. 154; Mare v. Charles, 5 E. & B. 978.

This rule seems to be the result of the operation of two other rules, the first being that no one can be liable as acceptor but the person to whom the bill is addressed, unless he is an acceptor for honour;[3] the second, that the words of an instrument must not be construed so as to make it void, if they will reasonably bear an interpretation making it valid.[4]

(c) **If a bill is drawn by an agent in his personal character, he will be personally liable as drawer.**[5]

(d) **If a bill is drawn upon several, one of whom accepts, he is liable as acceptor.**[6] So, if more accept, they are liable.[7]

(e) **The debt of a third person is a good consideration,** for which a man may bind himself by giving a bill of exchange.[8]

SECT. 2. *Promissory Notes.*

Summary of Rules.]—(a) **Where a person promises and signs in the character of agent he will not be personally liable, nor where the agent uses words importing agency in the signature only, and not in the body of the instrument, will he be held to be a party to the contract.**[9] **Care must be taken to distinguish between words descriptive of the agent's office or employment, and words importing agency.** The former have no influence upon the contract, whereas the latter indicate that the agent is no party.[1]

(b) **As a general rule, an agent who makes a note cannot relieve himself of liability unless the fact that he made it as agent appears on the face of the instrument.**[2]

(c) Confusion has sometimes been introduced into arguments owing to **a mistaken identification of the principles applicable to bills of exchange with those that are appli-**

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3. Polhill v. Walter, 3 B. & Ald. 164.
4. Mare v. Charles, *supra.*
5. Leadbitter v. Farrow, 5 M. & S. 345; Newhall v. Dunlay, 14 Me. 180.
6. Owen v. Van Uster, *infra.*
7. Bult v. Morrell, 12 A. & E. 745.
8. Thomas v. Bishop, 2 Str. 955.
9. Alexander v. Sizer, L. Rep., 4 Ex. 105; *Ex parte* Buckley, 14 M. & W. 469, overruling Hall v. Smith, 1 B. & C. 407.

1. See Dutton v. Marsh, L. R., 6 Q. B. 361, and cases *infra.*
See the cases collected in note, Evans Agency, 177.

2. See Wake v. Harrop, 30 L. J., Ex. 273.

cable to promissory notes. Two distinctions between these instruments should never be lost sight of.

The first is that a bill of exchange incorporates in the acceptance the person on whom the bill is drawn.

The second is that an acceptor cannot limit or vary his liability by addition of words of description.[3]

If the names of the drawee and acceptor are not the same, the rule that the acceptor and drawee must be identical is not necessarily infringed. Parol evidence may be given to show that the acceptor has authority from the drawee to accept on his behalf. If this evidence is given the bill is valid and binding on the drawee,[4] for he is incorporated in the acceptance. The meaning of the second distinction is clear: an acceptor who is drawn upon personally cannot exempt himself from liability by accepting on behalf of another person to whom the bill is not addressed.

SECT. 3. *Bought and Sold Notes.*

Summary of Rules.]—(a) **The material question is, What is the intention expressed in the contract?** Whether an alleged principal is an Englishman or a foreigner resident abroad is in itself immaterial.[5] This must be taken subject

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3. An acceptance, signed "J. T., administrator," binds J. T. personally. Tasey v. Church, 4 W. & S. 346.

So a note in the form, "I. T. F., guardian of E. S., promise," etc., signed "T. F., guardian," binds T. F. personally. Forster v. Fuller, 6 Mass. 58.

An indorsement of a promissory note thus, "L. R., receiver," binds L. R. personally. Towne v. Rice, 122 Mass. 67.

4. Lindus v. Bradwell, 5 C. B. 583.

5. Mahoney v. Kekule, 14 C. B. 390; Green v. Kopke, 18 ibid. 549.

The rule upon this subject is laid down by Judge Story, that "agents or factors acting for merchants resident in a foreign country are held personally liable upon all contracts made by them for their employers; and this without any distinction, whether they describe themselves in the contract as agents or not. In such cases, the ordinary presumption is, that credit is given to the agents or factors; and not only, that credit is given to the agents or factors, but that it is exclusively given to them, to the exoneration of their employers. Still, however, this presumption is liable to be rebutted, either by proof that credit was given to both principal and agent, or to the principal only; or that the usage of trade does not extend to the particular case." See Story on Agency, § 238.

The doctrine thus broadly stated

to what is said upon the question whether an agent has implied authority to pledge his foreign principal's credit.

[194] (b) **If the contract is signed without the use of any words importing agency, the person so signing is by virtue of the contract both entitled and liable, unless in the body of the contract a contrary intention is clearly shown.**[6]

(c) **An agent, then, may free himself from personal liability either by signing as agent,**[7] **or by using in the body of the contract words importing agency.**[8]

SECT. 4. *Charter-parties not under Seal.*

In a charter-party, as in every contract, if the agent chooses to make himself a contracting party, the other contracting party may either sue the agent who has himself contracted, though on behalf of another, or he may sue the principal who has contracted through his agent. He may do so whether the principal was known at the time or not. This right is independent of any remedy acquired by a stipulation for a lien or otherwise over the goods.[9] This, however, does not prevent an agent from stipulating in the charter-party that his liability shall cease under the contract after a certain time, or upon the happening of a certain event.[1]

An agent may execute a charter-party in any of the following ways:

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has, however, been questioned. See Kirkpatrick v. Stainer, 22 Wend. 244, 259; Taintor v. Prendergast, 3 Hill, 72; Oelricks v. Ford, 23 How. (U. S.) 49, 64; Bray v. Kettell, 1 Allen, 80; Barry v. Page, 10 Gray, 398, where it is held that a foreign principal may maintain an action in his own name for goods sold by his agent here, although no agency is disclosed at the time of the sale.

6. Per Kelly, C. B., in Paice v. Walker, L. R., 5 Ex. 173.

The agent becomes personally liable only where the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or where he exceeds his power. 2 Kent Com. 630, and authorities cited.

7. Fairlie v. Fenton, L. R., 5 Ex. 169.

8. Gadd v. Houghton, *supra;* and see Sharman v. Brandt, L. R., 6 Q. B. 720.

9. Per Blackburn, J., in Christoffersen v. Hansen, L. R., 7 Q. B. 513.

1. Pederson v. Lotinga, cited L. R., 7 Q. B. 510.

(1) **He may describe himself as agent of a named principal.** In this case his liability or non-liability upon the contract is a question of construction and intention.[2]

(2) Assuming, however, that he has authority, **if he executes it in the name of his principal, and signs per proc.,** his execution of the instrument will bind the principal but not himself.

In order to be free from any chance of incurring personal liability, **the agent should not only in signing the contract use words importing agency, but he should show in the body of the instrument that he is not a contracting party.**[3]

(3) **Where an agent describes himself in the body of the instrument as an agent for his principal, he will not be protected if he signs the contract in his own name simply.**

[208[Agents have been held liable who have described themselves as signing "on behalf of N."[4] "by authority of and as agents of," etc.;[5] so the form "A. B., agent of C. D.," is held to be a mere description, and not necessarily an execution for a principal.[6] The law is quite clear that if a man covenants in his own name on behalf of another, he is liable on his covenant; and if he promises in the same manner, he is liable upon his promise in *assumpsit*.[7]

If the agent contracts in his personal character in the body of the instrument, but uses words importing agency in his signature, he nevertheless makes himself a party to the contract.[8]

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2. See Lennard v. Robinson, 5 E. & B. 125.

3. Lennard v. Robinson, 5 E. & B. 125; Deslandes v. Gregory, 29 L. J., Q. B. 93; where the principal is undisclosed, see Hutchinson v. Tatham, L. R., 8 C. P. 483.

4. Tanner v. Christian, 24 L. J., Q. B. 91.

5. Lennard v. Robinson, *supra*.

6. Parker v. Winlow, 7 E. & B. 942.

7. Per Abbott, C. J., in Kennedy v. Gouveia, 3 D. & R. 503.

8. Lennard v. Robinson, *supra*.

[212] BOOK III.

OF THE RIGHTS, DUTIES, AND LIABILITIES ARISING OUT OF THE CONTRACT.

CHAPTER I.

DUTIES OF AGENTS — DIGEST OF RULES.

SECT. 1. *Duties of Agents in general.*

The following section deals very briefly with rules and principles which will be found more fully discussed in the chapters relating to the authority and liability of an agent:

The rules, then, incumbent upon agents in general are the following: The agent must be careful

(a) **To perform the duties undertaken.**
(b) **To act in the name of his principal.**
(c) **To act in person.**
(d) **To obey instructions** and observe the terms of the authority.
(e) **In the absence of instructions to conform to usage** or recognized mode of dealing.
(f) **To act in good faith.**
(g) To use reasonable skill and ordinary diligence.
[213] (h) To make a full disclosure where he has an adverse interest.[1]
(i) **To render full accounts of receipts and disbursements.**
(k) **To keep the goods and money of the principal separate from his own.**

(a) **As soon as an agent has undertaken to execute a commission for a valuable consideration, he binds himself to perform it,** and will be liable for its performance in the

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1. It is an agent's duty to give his principal timely notice of every fact which may make it necessary to take measures for his security. Moore v. Thompson, 9 Phila. 164; Clark v. The Bank of Wheeling, 17 Penn. St. 324.

absence of a fresh contract, releasing him, unless the agreement is either illegal, immoral, or absolutely impossible.

(b) **The reason of the rule which requires an agent to act in the name of his principal is obvious.** In so far as he undertakes to act as an agent, he undertakes to represent the principal only.

(c) **The rule that an agent must act in person** is subject to certain exceptions which have already been touched upon in a consideration of the question of delegation of authority.

(d) **The duty of the agent to obey his instructions and observe the terms of his authority is qualified by the operation of certain well-known principles of law.** They are as follows:

(1) When the authority or instructions require him to do an **illegal or immoral act** he will **not** be **justified** in doing such act.

(2) **Where a deviation from the strict performance of his authority is due to necessity or to unforeseen emergency,** which is itself not due to the agent's default, such deviation is justifiable.[2]

(3) **If the terms of the authority have been substantially performed, a circumstantial variance will be held to be immaterial.**

(4) **Where the instructions are ambiguous the agent who acts in good faith on the probable construction is not liable.**

(e) **These rules and principles have already been considered at length.** When an agent is commissioned to do any act, [214] nothing further being said as to the mode of performance and the like, it will be important for him to consider whether there exists **any recognized usage of trade** or mode of dealing. The authority and instructions will be interpreted as embodying an implied agreement that the usage shall be observed.

(f) **The agent's position is one of trust, and, no agent**

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2. See *ante*, Authority of Masters of Ships.

will be allowed to take any advantage of his position to the detriment of his principal.

(g) **An agent must use reasonable skill and diligence** in the execution of his authority. The standard of the diligence required in any employment is generally said to be twofold. It may be either that diligence which a man shows in the conduct of his own affairs, or it may be that diligence which is characteristic of a good man of business when engaged in the particular employment. The former has been termed *diligentia quam suis*, the latter, *diligentia diligentis patris familioe*. The one is a standard that varies with each individual, the other has a more fixed and stable character, being that which reasonable men conversant with the particular employment would have no difficulty in determining. This latter is the standard of skill and diligence required of agents. If an agent has authority to employ deputies he will be liable for any negligence in selecting improper persons, but not for the negligence of the deputies themselves.[3]

The rule adopted by Mr. Justice Story[4] is, that the agent contracts for reasonable skill and ordinary diligence; by the former being understood such skill and no more than is ordinarily possessed and employed by persons of common capacity engaged in the same trade, business or employment; and by the latter that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs.[5]

(h) **Wherever two persons stand in such a relation that while it continues confidence is necessarily possessed by one, and the** [215] **influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the**

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3. See McCants v. Wills, 4 Rich. (S. C.) 381; Whitlock v. Hicks, 75 Ill. 460; Warren Bank v. Suffolk Bank, 10 Cush. 585.

4. Story on Agency, § 183.

5. See Book III, Chap. II, p. 237. Chapman v. Watson, 10 Bing. 57; Leverick v. Meigs, 1 Cow. 645; Heinemann v. Heard, 50 N. Y. (anno. reprint) 27.

advantage, although the transaction could not have been impeached if no such confidential relation had existed.[6]

SECT. 2. *Duties of Particular Classes of Agents.*[7]

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[223] CHAPTER II.

LIABILITIES OF AGENT TO PRINCIPAL ON CONTRACTS.

SECT. 1. *Of the Liability Generally.*

An agent may be personally liable upon his contracts to his principal or to third parties.

First, then, as to his liability to his principal.

Whenever an agent violates his duties to his principal, he will be liable to indemnify the latter for any loss sustained by him, provided the loss is a natural result of such violation of duty.[1]

This rule applies wherever the agent, not being a gratuitous agent, neglects to enter upon the performance of what he has undertaken;[2] or where the agent fails to exercise that degree of skill which is imputable to his situation or employment;[3] or where he neglects the express instructions of his principal, or duties that may be reasonably inferred[4] either from the principal instructions,[5] or from usage of trade or mode of dealing,[6] provided the deviation from

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6. Tate v. Williamson, L. R. 6 Ch. 61, and cases cited in the chapter on Fiduciary Relations.

7. The subjects treated in this section, viz.: the duties of auctioneers, masters of ships, etc., having been already considered, will not be here repeated. See, Book III, Ch. 2; Tiffany on Agency, Scope of Particular Agencies, pp. 203-228, and cases cited.

1. Paley on Agency, by Lloyd, 9, 10, 16, 17. Bell v. Cunningham, 3 Pet. 69; Dodge v. Tileston, 12 Pick. 328; Pownall v. Blair, 78 Penn. St. 403; Price v. Keyes, 62 N. Y. (anno. reprint) 378.

2. Elsee v. Gatward, 5 T. R. 143.

3. Shiells v. Blackburn, 1 H. Bl. 158.

4. Smith v. Lascelles, 2 T. R. 187; Wallace v. Telfair, 2 T. R. 188, note.

5. Park v. Hammond, 4 Camp. 344.

6. *Ex parte* Belchier, Ambl. 218; Moore v. Morgue, Cow. 480; Paley, 9.

his duties implied or express is not of a slight and unimportant character, or occasioned by a sudden and unforeseen emergency,[7] or justified by the illegality of the instructions, in which cases the agent will not be liable. The same rule applies where the agent neglects to keep regular accounts,[8] or to account for profits made in the course of his agency,[9] or when he mixes the property of his principal with his own.[1] And where an individual is known to be contracting on behalf of a known principal, he will, as a general rule, incur [225] no personal liability upon such contract,[2] unless such liability is necessarily implied from his conduct or the form of the contract into which he has entered.

An agent may contract orally or in writing. If he contracts orally, his liability or non-liability will depend upon the answer to the question—to whom was credit given? This is a question of fact.[3] If the agent acts within the scope of his authority, and credit is given to the principal alone, the former will incur no personal liability; but if credit is given to the agent alone, or to him and his principal jointly, he will be personally liable.[4] If the agent contract in writing or under seal, his liability or non-liability will, as a general rule, depend upon the true construction of the writing, though, as will be seen hereafter, a *prima facie* liability upon a written instrument may in certain cases be rebutted.[5]

If a principal has entrusted goods to his agent for sale, and that agent wrongfully raises money upon such goods, the principal is at liberty, at any time after he discovered the fact, in taking the accounts between himself and his

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7. Catlin v. Bell, 4 Camp. 183.

8. White v. Lady Lincoln, 8 Ves. 363.

9. Rogers v. Boehm, 2 Esp. 702; Thompson v. Havelock, 1 Camp. 527; Turnbull v. Garden, 38 L. J., Ch. 331.

1. Rogers v. Boehm, *supra;* Travers v. Townsend, 1 Bro. Ca. Ch. 384; Wren v. Kirton, 11 Ves. 377, 382.

2. Paterson v. Gandasequi, 15 East, 62; *Ex parte* Hartop, 12 Ves. 352.

3. Scrace v. Wittington, 2 B. & C. 11; Iveson v. Connington, 1 B. & C. 160.

4. *Ex parte* Hartop, *supra.*

5. See Wake v. Harrop, 1 H. & C. 202; and Lindus v. Bradwell, 5 C. B. 583.

agent, to abandon the goods altogether, and to treat the money so raised as money had and received to his own use.[6]

SECT. 2. *Measure of Damages.*

The measure of the damages to which he may be liable must be ascertained by the application of rules common to the whole law of contracts. The general rule of law upon the subject was laid down by the Court of Exchequer in the often-quoted case of Hadley v. Baxendale.[7] The rule enunciated by the court in that case is, that where two parties have made a contract, which one of them has broken, **the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.**

But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances, such damages cannot be recovered.[8]

[235] SECT. 3. *Omission to perform Gratuitous Undertaking.*

In order to maintain an action against an alleged agent for omitttting to perform something undertaken, the princi-

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6. The right to waive a tort and sue in assumpsit will be found treated at length by Judge Cooley in the Bench and Bar for January, 1871 (Vol. 2, p. 218); and see Cooley on Torts, 91 *et seq.*

7. 9 Ex. 341, 354; 23 L. J., Ex 182. See this case in Sedgwick's Leading Cases on the Measure of Damages, p. 126.

8. Per Blackburn, J., in Horne v. Midland Railway Company, L. Rep., 8 C. P. 140. See, generally, as to damages, Hale on Damages; Southerland on Damages and Sedgwick on Damages.

pal must show that the agent **was bound either by custom, or by some duty imposed on him by law to do the particular thing.** When there has been **no consideration for** his promise, it connot be said that the agent has been bound by contract. This was laid down clearly in the old law books. Thus it was said, if a person promises to build a house within a given time, **no action lies for non-performance,** unless a consideration be alleged for it.[9] To the same effect are the observations of Lord Holt in the case of Cogs v. Bernard.[1] Such a custom exists in the case of a ferryman, carrier, porter or innkeeper, **but not in the case of an attorney.**[2]

It may be taken as a universal proposition **that an agent, whether remunerated or unremunerated, is liable to his principal for the loss suffered by the latter owing to the negligence of the agent in performing the duties undertaken. The distinction between paid and unpaid agents vanishes in considering their liability for misfeasance.**[3] No universal rule, however, can be laid down to determine what amount of negligence will render each and every agent liable. **Actionable negligence is not a constant but a variable quantity.** Actionable negligence varies with the amount of skill any particular agent or class of agents is presumed to bring to bear upon the performance of the duties he has undertaken.

SECT. 4. *Negligence in Performing Undertaking.*

An agent is liable for misfeasance in performing a gratuitous undertaking if he fails to exercise that degree of skill which is imputable to his situation or employment. Any failure on his part to fulfil the obligations imposed upon him as being possessed of the skill which he hold himself out to the world as possessing is actionable negligence.

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9. I Rol. Abr. 9 E. 41.

1. 2 Ld. Raym. 909; see, too, Lea v. Welch, 2 Ld. Raym. 1516. See Elsee v. Gatward, 5 T. R. 143.

2. Fish v. Kelly, 17 C. B., N. S. 194.

3. 13 C. B. 466. See this subject fully considered in Edwards on Bailments, §§ 77 *et seq.*; Story on Bailments, §§ 165 *et seq.*; 2 Kent Com. *569 *et seq.*; Thorne v. Deas, 4 Johns. 84.

[243] SECT. 5. *Profits made in course of Agency.*

All profits directly or indirectly made in the course of, or in connection with, his employment by a servant or agent without the sanction of the master or principal, belong absolutely to the master or principal.[4] So, whenever the earnings acquired in the service of a third person have reached the hands either of the servant who acquired them or of the master, they belong to the master.

SECT. 6. *Liability of Agent to account.*

An agent may be bound to account—

(1) For the property of his principal.
(2) For interest in some cases.[5]

Executors in all cases must account for interest if they have used the money in trade, or received any interest for it.[6]

If in any case an executor or trustee makes any advantage of the trust money, the *cestui que trust* is entitled to it; and if he incurs any loss by undue management or wilful neglect, he must answer for it to the *cestui que trust.*[7]

[248] So a receiver of a public trust who made interest of the balances in his hands;[8] an administrator who retained and made use of the undistributed property;[9] mercantile agents who made use of remittances as their own;[1] a person bound by recognizances to account annually, though he had

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4. *Any advantage gained by the agent, whether it is the part of performance or violation of duty, belongs to the principal.* See Dodd v. Wakeman, 26 N. J. Eq. 484; Judevine v. Hardwick, 49 Vt. 180; Dutton v Willner, 52 N. Y. (anno. reprint) 312.

5. Interest is to be allowed where the law, by implication, makes it the duty of the party to pay over the money to the owner without any previous demand on his part. Dodge v. Perkins, 9 Pick. 368.

6. See this subject fully considered in 2 Wms. on Ex'rs (6 Lond. ed.), p. 1702 *et seq.*

7. Lowson v. Copeland, 2 Bro. C. C. 156; Hill v. Simpson, 7 Ves. 152; Lee v. Lee, 2 Vern. 548.

8. Earl of Lonsdale v. Church, 3 Bro. C. C. 41.

9. Stacpoole v. Stacpoole, 4 Dow, 209.

1. Rogers v. Boehm, 2 Esp. 702.

made no use of the money;[2] and a receiver keeping money in his hands after it was due,[3] have been held accountable for interest.

An auctioneer being, as a rule, only a stakeholder, is not liable to pay interest on money in his hands, whether he has used the money or not.[4]

As a rule an agent is liable to acount to his principal only. It is immaterial that the principal is trustee of a charity, and manages its affairs by an agent, who receives the income, and [249] has in his possession the title-deeds.[5]

So, too, as a rule, when a sub-agent is employed by an agent, he is only liable to account to the agent and not to the principal;[6]

An agent who fails to account is liable to forfeit remuneration for his labour. Mere irregularity, however, in the account, will not suffice to work such forfeiture. If the agent can make out his claim by satisfactory evidence he will be paid.[7]

It is a settled rule of law that an agent shall not be allowed to dispute the title of his principal.[8] Hence, after accounting with his principal, and receiving money as agent, he cannot afterwards say that he did not receive it for the benefit of his principal, but for that of some other person.[9] A bailee has no better title than the bailor, and consequently, if a person entitled as against the bailor to the [251] property claims it, the bailee has no defence against him.[1]

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2. Dawson v. Massey, 1 Ball & B. 219.

3. Fletcher v. Dodd, 1 Ves. Jr. 85.

4. Harrington v. Hoggart, 1 B. & Ad. 577.

5. Attorney-General v. Chesterfield, Earl of, 18 Beav. 596.

6. Cartwright v. Hateley, 1 Ves. Jr. 292; Stephens v. Badcock, 3 B. & Ad. 354. See, however, Turner v. Turner, 36 Tex. 41; Louisville, etc., Ry. Co. v. Blair, 4 J. Baxter, 407.

7. White v. Lady Lincoln, 8 Ves. 363. Willard's Eq. Jur. *104.

8. See Holbrook v. Wight, 24 Wend. 169; Barnardo v. Kobbe, 54 N. Y. (anno. reprint) 516; Collins v. Tillou, 26 Conn. 368; Edwards on Bailments, § 73.

9. See per Abbott, C. J., Dickson v. Hammond, 2 B. & Ald. 310.

1. Wilson v. Anderton, 1 B. & Ad. 450; Biddle v. Bond, *supra*. The bailee will not be excused from his duty to restore the property bailed, to his bailor, unless he shows that it was taken from him by one possessing a paramount title, or by due

[254] CHAPTER III.

DUTIES AND LIABILITIES OF AGENT IN FIDUCIARY POSITION.

SECT. 1. *Fiduciary Relations generally.*

The terms "trustee" and "agent" are frequently used in a loose way as though those terms marked off absolutely distinct and separate duties and liabilities. **All trustees, however, are agents; but all agents are not trustees. A trustee is an agent and something more.** An agent is simply one placed in the stead of another; he is a trustee only so far as there is vested in him for the benefit of another some estate, interest, or power in or affecting property of any description; and an agent, who is in a fiduciary position, is a trustee in this sense of the word; in other words, fiduciary and trustee are convertible terms.[1] Wherever there is a relation which puts one party in the power of the other, there exists a fiduciary relation.[2] No hard and fast precise rule is laid down for the regulation of the dealings of persons in a fiduciary position. Where the known and defined relation exists, the conduct of the party benefited must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection. Where, on the other hand, the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired.[3] The relation of principal and agent is a relation which may put one party in the power of another to a greater or less extent according to the cir-

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process of law, or that the title of his bailor is ended. See Burton v. Wilkinson, 18 Vt. 186; McKay v. Draper, 27 N. Y. (anno. reprint) 256.

1. Tate v. Williamson, L. Rep. 2 Ch. 61.

2. Sears v. Shafer, 6 N. Y. (anno. reprint) 268.

3. See, however, 1 Story's Eq. Jur., §§ 218, 309 *et seq.*

cumstances of the case. The confidence reposed in the agent might be abused with impunity in a variety of ways, did not the doctrines of equity intervene.[4]

SECT. 2. *Agent employed to purchase.*

The cases that have reference to the fiduciary relation of agents employed to make a purchase may be divided into three classes.

(1) **Where the agent prevents the principal beneficiary or cestui que trust from purchasing property, and purchases it himself for** the purpose of gaining a profit for himself.

(2) **Where the agent sells his own property to the principal,** [263] **cestui que trust, or beneficiary, but conceals the fact that it is his own.**

(3) **Where the agent is expressly authorized to buy, and he does so at a certain price, and then misrepresents to his principal what has been done, thereby gaining for himself a profit in the transaction.**

(1) An agent who is employed to make a purchase for his principal will not be permitted either to purchase for himself or to make a feigned purchase for his principal from himself without the consent of his employer.[5] If such an agent becomes a purchaser for himself, he will be considered as a trustee for his principal.[6] **An agent will not be allowed to make a secret profit out of the conduct of his**

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4. See 1 Story's Eq. Jur., §§ 315, 316. This subject is too extensive to be treated here.

5. Taussig v. Hart, 58 N. Y. (anno. reprint) 425; Tewksbury v. Spruance, 75 Ill. 187; Ely v. Hanford, 65 id. 267.

6. Ringo v. Binns, 10 Pet. 269; Von Hurter v. Spengeman, 17 N. J. Eq. 185; Wolford v. Herrington, 74 Penn. St. 311; Van Epps v. Van Epps, 9 Paige, 237.

"The policy of the law forbids, as conducive to fraud and inimical to fair dealing, the purchase by masters, trustees, executors, administrators, guardians, and all others, at their own sales, as also all agents, public and private, who are concerned in selling, whether such purchase be direct or indirect; and, if made, such sales will be set aside on application of the parties interested." Rorer on Jud. Sales (2d ed.), § 413, where a large collection of cases upon the point will be found.

agency; and an agent employed to purchase will not be allowed to sell to his principal at a higher price than he gave himself.[7]

The dealings of an agent with his principal will not in any case be deemed valid, unless they are accompanied with the most entire good faith, and unless there is a full disclosure of all facts and circumstances, as well as an absence of all undue influence, advantage, or imposition.[8]

SECT. 3. *Fiduciary Relations where the Agent is appointed to sell.*

The policy of the law is to prevent any person placing himself in a position where his interests conflict with his duty. If it is the duty of one individual to act for another, he must act in perfect good faith. He cannot take advantage of a confidence reposed in him. He cannot enrich himself by a violation of his duty in the smallest particular. The cases in the reports upon the present question are very numerous.[9]

The fact that the agent has used the name of another person as the purchaser instead of his own is sufficient to invalidate the transaction in equity.[1] Proof of undervalue is not necessary.[2] In order that an agent, employed to sell, may purchase himself, he should disclose to his principal all the knowledge which he himself possesses.[3]

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7. Ely v. Hanford, 65 Ill. 267; Collins v. Case, 23 Wis. 230.

8. See this subject considered at length in 1 Story's Eq. Jur. § 315 *et seq.*

9. See notes, Evans Agency (Ewell's ed.), 369 *et seq.*

1. Trevelyan v. Carter, 9 Beav. 140; Lewis v. Hillman, 3 H. L. Ca. 607; Davoue v. Fanning, 2 Johns. Ch. 252.

2. Murphy v. O'Shea, 2 J. & L. 420.

In the case of a contract of purchase and sale between attorney and client, or principal and agent, or of an agreement giving benefits and advantages to the agent or attorney, the burden of establishing its perfect fairness, adequacy and equity, is thrown upon the attorney or agent, and in the absence of such proof, courts of equity treat the case as one of constructive fraud. Condit v. Blackwell, 22 N. J. Eq. 481, citing Parkist v. Alexander, 1 Johns Ch. 394, and other cases.

3. Lowther v. Lowther, 13 Ves. 103; Farmer v. Brooks, 9 Pick. 213. See *ante* notes.

SECT. 4. *Fiduciary relation of Directors.*

Directors are persons selected to manage the affairs of a company for the benefit not of themselves but of the shareholders. Their office is one of trust.[4] If they undertake the office, their duty is to execute it fully and entirely. If that office requires all their time and attention, it is their duty to give them.[5] Their fiduciary character is well established, nor can they by any subterfuge, however skilful and however coloured, take advantage of their position to the detriment of the shareholders. They will not, any more than other agents, be allowed to make a secret profit out of their office, or in transactions with the company.[6]

Few principles of law are better established than the rule that an agent cannot be allowed to make any profit out of the matter of his agency, without the knowledge and con-

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4. *Equity deals with the directors of a private corporation as trustees* of the corporation; *but with merely ministerial officers (in this case the superintendent of the company's mills) as agents.* Cook v. The Berlin Woolen Mill Co., 43 Wis. 433; Cumberland Coal Co. v. Hoffman Steam Coal Co., 18 Md. 456; Michoud v. Girod, 4 How. 554; Hodges v. New Eng. Ecrew Co., 1 R. I. 321; Robinson v. Smith, 3 Paige, 222; Verplanck v. Ins. Co., 1 Edw. Ch. 84; Percy v. Millodon, 3 La. 568; Jackson v. Ludeling, 21 Wall. 616; Ang. & Am. on Corp. § 312.

The same rules are appilcable to the contracts of directors with the corporation, as are applicable to the dealings of other parties holding a fiduciary relation to each other. See Perry on Trusts, § 207, and the above cited authorities.

An express contract between a director and his company is not void, but voidable at the option of the cestui que trust exerciscd within a reasonable time. Stewart v. Lehigh Valley R. R. Co., 38 N. J. Law, 505.

The law does not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity, and express contracts thus made are contrary to public policy. *A promissory note, therefore, made by a corporation, payable to its acting trustees, is void.* Wilbur v. Lynde, 49 Cal. 290; San Diego v. San Diego, etc. R. R. Co., 44 id. 106, 112.

But the doctrine that the directors of a corporation are trustees for the stockholders, has relation only to the acts of the directors in connection with the property held by the corporation itself, and to their management of its business. Commissioners of Tippecanoe County v. Reynolds, 44 Ind. 559. See, also, Spering's Appeal, 71 Penn. St. 11.

5. See per Sir J. Romilly, The York and North Midland Rail. Co. v. Hudson, 16 Beav. 485; Bennett's case, 4 De G. & M. 297.

6. See *ante.*

sent of his principal, beyond his proper remuneration as agent.

Secondly, **as to promoters.**

When it is once established that promoters are in a fiduciary position, they cannot become vendors to the company unless they make a full disclosure.

The following propositions may be gathered from the opinions delivered by the learned Lords Justices:

(1) A promoter is in a fiduciary relation to the company which he causes to come into existence. If he has a property which he desires to sell to the company, it is quite open to him to do so, but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. There is no difference in this respect between a promoter and a trustee, steward or other agent.

(2) It is not merely a technical rule which requires that a vendor in any respect in a fiduciary position should tell the exact truth as to his interest.

(3) A contract entered into by one agent of the promoter of a company to sell with another agent of the promoter to buy, is a mere pretence or sham contract.

(4) The company being the body with whom, by its agents, the contract is entered into, must be the body to set it aside, and although individual shareholders who were parties to the fraud may be benefited, yet it is not the [285] doctrine of the courts of equity to hold its hand and avoid doing justice because it cannot apportion the punishment.

(5) All members of a syndicate, under circumstances such as are above stated, are liable jointly and severally.

SECT. 5. *The Fiduciary Position of Legal Advisers.*

(a.) *In the matter of contract.*

The general rule of law, equally applicable to all trustees and persons in a fiduciary position, is, that no person in

such a position may take advantage of the confidence reposed in him. The sound policy upon which the rule is based is nowhere more apparent than in transactions between parties standing in the relation of solicitor and client or counsel and client.

The subject may be considered in its consequences:

(1) In matters of contract;
(2) Where the client makes a gift;
(3) In the matter of giving professional service.

(1) Legal advisers may contract with their clients provided the relation is dissolved, provided the duties attaching to their position are satisfied.[7] The relation between the parties must be changed; that is, the confidence in the party, the trustee or attorney, must be withdrawn. "An attorney buying from his client can never support it unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule."[8] The proof of actual fraud or incapacity on the part of the attorney, is not necessary in order to set aside [288] the contract.[9]

(b.) *Where the client makes a gift to his adviser.*

No gift or gratuity to a legal adviser, beyond his fair professional demand, made during the time that he continues to conduct or manage the affairs of the donor, will, as a rule, be permitted to stand, more especially if such gift

7. There are no transactions which courts of equity will scrutinize with more jealousy than dealings between attorneys and their clients, especially where the latter are persons of inferior capacity and inexperienced in business. Mills v. Mills, 26 Conn. 213; Gibson v. Jeyes, 6 Ves. 266. See, also, Nesbit v. Lockman, 34 N. Y. (anno. reprint) 167.

8. In the case of a contract of purchase and sale between attorney and client, or of an agreement giving benefits and advantages to the agent or attorney, the burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, and in the absence of such proof, courts of equity treat the case as one of constructive fraud. See Condit v. Blackwell, 22 N. J. Eq. 481; Howell v. Ransom, 11 Paige, 538; Dunn v. Record, 63 Me. 17; Hitchings v. Van Brunt, 38 N. Y. (anno. reprint) 335.

9. 6 Ves. 270.

or gratuity arises immediately out of the subject then under the adviser's conduct or management, and the donor is at the time ignorant of the nature and value of the property so given.[1]

The rules with regard to gifts are more stringent than those with regard to purchases.[2] The rules against gifts, it has been said, are absolute; the rules against purchases are modified.[3] Parol evidence is admissible to prove that no consideration passed between solicitor and client, although a consideration appears on the face of the conveyance.[4] Whenever a case comes before the courts it must stand upon its own circumstances, and the court will try the application of the principles.[5]

(c.) *In respect to rendering services.*

Wherever a professional man is called in to give his services to a client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences likely to result, and requires that he should distinctly and clearly point out to his clients all those consequences from whence a benefit may arise to himself from the instrument so prepared; and if he fails to do so, he will not be allowed to retain the benefit[6]

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1. Middleton v. Wells, 1 Cox, 112; 4 Bro. P. C. 245.

2. Greenfield's Estate, 14 Penn. St. 489, 506. The rule would seem to be more stringent than where the advantage flows from a contract or mutual arrangement.

3. Per Lord Justice Turner, in Holman v. Loynes, 18 Jur. 543.

4. Tompson v. Judge, 3 Drew. 306.

5. Ormond v. Hutchinson, 13 Ves. 47, per Lord Erskine.

6. Watt v. Grove, 28 Ch. & Lef. 491; Bulkley v. Wilford, 2 C. & F. 102.

[299] CHAPTER IV.

LIABILITY OF AGENTS TO THIRD PARTIES.

SECT. 1. *On Contracts.*

(a.) *Where Agent contracts without Authority.*[1]

He may after the determination of his authority act upon a belief that his authority is still in force.

1. Acting upon such belief he may omit to give to the other contracting party such information as would enable that other equally with himself to judge as to to the authority under which he proposed to act.
2. Acting upon such a belief he may give to the other contracting party all such information.

The leading case upon the first point is that of Smout v. Ilbery,[2] decided in the year 1842.

Secondly, the fact that a person assumes to act as agent owing to an honest mistake, is not any ground to free him from liability.[3]

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1. *An agent who makes a contract not binding upon his principal by reason of the fact that it was unauthorized, is liable in damages to the person dealing with him upon the faith that he possessed the authority assumed.* See Baltzen v. Nicolay, 53 N. Y. (anno. reprint) 467.

2. This case was an action for goods supplied to a married woman by the plaintiff, who had been in the habit of supplying the defendant's husband, and who continued to supply the wife after her husband went abroad, where he died. The question for the court to determine was, whether the wife was liable for the goods supplied from the date of her husband's death until the arrival of the news of the death. 10 M. & W. 1. The court, having taken time to consider its judgment, which was delivered by Baron Alderson, held that the wife was not liable, on the ground "that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal."

The law of this case is doubted by Mr. Parsons in his work on contracts. 1 Pars. Cont. (6th ed.) *67, note *v.* See, however, Story on Agency, § 264, note.

3. Mr. Bigelow, in his collection of Leading Cases on Torts, says that "*it is settled law that if a person honestly assume to act for another*

The test, whether a person whose assumption of authority was due to an honest mistake is liable [303] for the consequence of his want of authority is, whether or not he has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act.[4]

(b.) *Where an agent contracts in his own name.*

Where an agent enters into a contract in his own name, he is *prima facie* liable upon that contract,[5] and the question arises whether parol evidence is admissible to relieve the agent of this *prima facie* liability.

It may be laid down generally that, wherever an agreement is made, parol evidence may be given to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principal; and this whether the agreement be or be not required to be in writing by the Statute of Frauds.[6] This evidence in no way contradicts the written agreement.

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in respect of a matter over which he has no authority, he renders himself liable to an action; the action being sometimes said to be for the breach of an implied warranty of authority, and in others for a false representation." Big. Lead. Cases on Torts, p. 22, citing Collen v. Wright, 8 Ell. & B. 647; Cherry v. Colonial Bank, L. R. 3 P. C. App. 24; Richardson v. Williamson, L. R. 6 Q. B. 276; White v. Madison, 26 N. Y. (anno. reprint) 117, 124; Jefts v. York, 4 Cush. 371; s. c., 10 id. 392; Bartlett v. Tucker, 104 Mass. 336.

4. See Polhill v. Walter, 3 B. & Ad. 114; Aspinwall v. Torrance, 1 Lans. 381; Newman v. Sylvester, 42 Ind. 106.

5. See Guernsey v. Cook, 117 Mass. 548.

6. Weston v. McMillan, 42 Wis. 567; Higgins v. Senior, 8 M. & W. 844; Eastern R. R. Co. v. Benedict, 5 Gray, 561.

The case of bills of exchange is an exception which stands upon the law merchant, and promissory notes another, for they are placed on the same footing by the Statute of Anne. Parke B., in Beckham v. Drake, 9 M. & W. 79; Anderton v. Shoup, 17 Ohio St. 125.

(c.) *Where the agent has received money.*

The result of the authorities may be thus summarized:

[313] **First, as to cases where money is paid to the agent for the use of his principal.**

An agent to whom money has been mispaid for the use of his principal is not personally liable to the person who makes the payment—

(1) Where the agent has [innocently] paid over the money to his principal without notice;[7]

(2) Where, before notice, the situation of the agent has been altered by anything done by him upon the assumption that the payment was good.[8]

The agent will be personally liable to the third party—

(1) Where the agent pays over the money to his principal after notice;[9]

(2) Where the agent, being a stakeholder, receives a deposit, which he pays over before the conditions upon which it is to be paid are fulfilled;[1]

(3) Where the agent retains money in satisfaction of an illegal claim, and pays it over to his principal, provided the maxim *in pari delicto* does not apply.[2]

An agent who receives money for his principal is liable as principal so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it,[3] but the mere forwarding of his account to the principal, and the placing the sum to his credit, is not such a change of circumstances as would free the agent from liability.[4]

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7. Pond v. Underwood, 2 Raym. 1210; East India Company v. Trillon, 3 B. & C. 280; Elliot v. Swartwout, 10 Pet. 137; Mowatt, v. McLelan, 1 Wend. 173.

8. Buller v. Harrison, Cowp. 565; La Farge v. Kneeland, 7 Cow. 456.

9. Hearsey v. Pruyn, 7 Johns. 179; Bend v. Hoyt, 13 Pet. 263.

1. See Carew v. Otis, 1 Johns. 418.

2. Towson v. Wilson, 1 Camp. 396.

3. Per Lord Ellenborough, Cox v. Prentice, 3 M. & S. 348.

4. Buller v. Harrison, Cowp. 565.

(d.) *Where the principal directs a payment to third parties.*

An agent who has received money from his principal to pay to a third person, is liable to the latter in an action; but in order to render the agent liable to a third person, there must be a specific appropriation of the money to the use of such third person assented to by the agent.[5]

SECT. 2. *In Tort.*

An agent or servant, except in the case of a master of a ship,[6] is not liable to third parties for acts of negligence,[7] but he is liable for acts of misfeasance.[8]

The rule is that an agent is personally liable to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done.[9] In the latter case the agent is liable only to his employer.

CHAPTER V. [335]

RIGHTS OF AGENT AGAIST HIS PRINCIPAL.

SECT. 1. *Right of Agent to Commission.*

This right may be derived from an express contract between the principal and agent, from a legal custom, or from an implied contract.[1] It is part of the general law of contracts that where there is an express contract between the parties, neither can resort to an implied one inconsistent with the express one.

The amount to which an agent is entitled will, in the ab-

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5. Paley, by Lloyd, p. 394; Williams v. Everett, 14 East, 582.

6. Morse v. Slue, 1 Vent. 238.

7. An agent is not liable to a third person for damage resulting to him from the non-performance or neglect of a duty which the agent owes to his principal. Denny v. The Manhattan Co., 2 Den. 115; s. c., 5 id. 639; Colvin v. Holbrook, 2 N. Y. (anno. reprint) 126.

8. Homer v. Lawrence, 37 N. J. Law, 46; Bell v. Joslyn, 3 Gray, 309; Henshaw v. Noble, 7 Ohio St. 231.

9. Paley, by Lloyd, 397.

1. See Cutter v. Powell, 6 T. R. 320; Smith's Lead. Cases, 17, and notes.

sence of an [express] contract of custom,[2] be fixed by a jury.[3]

When the authority has been duly executed, the agent is entitled to his commission, unless the services performed are illegal. An agent cannot claim commission upon a transaction which has been entered into in violation of his duties to his principal.[4]

Where an agent contracts to do an entire work for a specific sum, he can recover nothing unless the work is done, or unless it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the [352] conclusion that the parties have entered into a fresh contract[5]

SECT. 2. *Right to be indemnified.*

The principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him,[6] provided the act is not illegal.

The act by the performance of which the expense was made or damage sustained, must have been performed in pursuance of the authority or have been duly ratified.[7]

SECT. 3. *Right to lien.*

A lien at common law is a right to retain possession of

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2. See Suydam v. Westfall, 4 Hill, 211; Kock v. Emmerling, 22 How. 69.

3. The amount in such case must be *determined on a quantum meruit.* See Briggs v. Boyd, 56 N. Y. (anno. reprint) 289; Ruckman v. Bergholz, 38 N. J. Law, 531.

4. Scribner v. Collar, 40 Mich. 375.

5. Cutter v. Powell, 6 Term Rep. 320; s. c., 2 Smith's Lead. Cases, 17, 22. This subject will be found fully considered in the notes to this case.

6. Taylor v. Stray, 2 C. B., N. S. 175.

Generally it is the right of an agent to be reimbursed all his advances, expenses and disbursements, made in the course of the agency, on account of or for the benefit of his principal, when the advances, expenses and disbursements have been properly incurred and reasonably and in good faith paid, without any default on the part of the agent. Maitland v. Martin, 86 Penn. St. 120. See, also, Fowler v. N. Y. Gold Ex. Bank, 67 N. Y. (anno reprint) 138.

7. Corbin v. American Mills, 27 Conn. 274; Hurst v. Holding, 3 Taunt. 32.

the property of another until some claim is satisfied.[8] **Equitable liens are such as were recognized only in courts of equity. The main distinction** between common law liens and other liens is, that **possession is essential in the former case, but not in the latter.**

Liens are not possessory and non-possessory. The lien of agents, as agents, is for the most part of the former kind.

A lien has been defined as an obligation which, by implication of law and not by express contract, binds real or personal estate for the discharge of a debt or engagement, but does not pass the property in the subject of the lien[9] A lien then may be created by express contract, or it may be implied from the usage of trade or mode of dealing between the parties, or it may arise by operation of law.[1] [363] To establish a right to a common law or possessory lien certain conditions must be fulfilled:

(1) Possession by the claimant or his agent.
(2) The possession must be continuous.
(3) Possession must be acquired in good faith, and in the ordinary course of business or dealing.
(4) If possession is acquired through the owner's agent, he must be acting with authority.
(5) The claimant must obtain possession and claim lien in the same character; and conversely the owner must give possession and be indebted in the character. In other words, the claim must not be inconsistent with the terms upon which possession was obtained.

Liens are either general or particular.[2] **A general lien is a right to retain the property of another on account of a general balance** due from the owner to the person who has

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8. 3 Pars. on Cont. *234.

It is a simple right of retainer, personal to the party in whom it exists, and is not assignable or attachable as personal property, or as a chose in action, of the person entitled to it. Lovett v. Brown, 40 N. H. 511; Meany v. Head, 1 Mason, 319.

See, however, Warner v. Martin, 11 How. 209.

9. Fisher on Mortgages, s. 149.

1. 3 Pars. on Cont. *238.

The death of the principal does not deprive the agent of his lien. Newhall v. Dunlap, 14 Me. 180.

2. See Tiffany Agency, 464.

possession. A particular or specific lien is a right to retain the property of another for charges incurred or trouble undergone with respect to that particular property.[3] The former is not favoured by courts of law or equity; it can, in the absence of express contract, be claimed only as arising from dealings in a particular trade or line of business in which the existence of a general lien has been judicially proved and acknowledged, or upon express evidence being given that according to the established custom a general lien is claimed and allowed.[4] When a general lien has been judicially ascertained and established, it becomes a part of the law merchant which the courts are bound to know and recognize.[5] Particular liens, on the other hand, are favoured.[6]

[368] SECT. 4. *Liens of particular classes of agents.*

First, as to the lien of auctioneers:

An auctioneer has a special property in the goods sold by him and a lien on goods in his possession, or on the proceeds thereof, for his commission and expenses. He may retain his commission and expenses out of any deposit or sale proceeds which have been paid to him on account of his principal.[7]

Secondly, Bankers have a general lien upon all notes, bills, and other securities deposited with them by their customers, for the balance due to them upon the general account.[8]

Thirdly, Brokers do not, as brokers, possess a general lien.[9]

Fourthly, Factors have a general lien for the balance of the account.[1]

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3. Bevan v. Waters, 3 C. & P. 520.

4. See per Lord Campbell, Bock v. Gorrissen, 30 L. J., Ch. 42.

5. Brandao v. Barnett, 12 Cl. & F. 787.

6. Scarfe v. Morgan, 4 M. & W. 283.

7. Drinkwater v. Goodwin, Cowp. 251; Hammond v. Barclay, 2 East, 227; Story Agency, s. 27; Tiffany Agency, 465.

8. Paley by Lloyd, 131; Tiffany Agency, 465; Story Agency, s. 380; Bolland v. Bygrave, Ry. & Moo. 271. Bank of the Metropolis v. New Eng. Bank, 1 How. 234; 17 Pet. 174.

9. Barry v. Berringer, 46 Md. 59.

1. Kruger v. Wilcox, Amb. 252; Sewall v. Nichols, 34 Me. 582; Knapp v. Alvord, 10 Paige 205.

Fifthly, **A common carrier has a particular or specific lien at common law** which empowers him to retain goods carried by him until the price of the carriage of those particular goods has been paid.[2]

Sixthly, **The master of a ship has a maritime lien both for his wages and disbursements,** and his claim is to be preferred to the claim of a mortgagee.[3] A maritime lien does not include or require possession.

As to attorneys' liens, the rule in the United States is not uniform.[4] In some States the subject is regulated by statute. In the Federal courts and in some State courts there is a lien for fees, costs and disbursements;[5] in other States the lien is limited to statutory costs and disbursements;[6] in others the lien is denied, though the attorney may deduct his compensation from moneys in his hands.[7]

[377] SECT. 5. *Stoppage in transitu.*[8]

An agent has the right of stoppage in transitu:

When he has made himself liable for the price of goods consigned by him to his principal, by obtaining them in his own name and on his own credit.[9]

The right, however, does not exist if at the time of the

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2. Butler v. Woolcott, 2 N. R. 64.

3. The Mary Ann, L. R., 1 A. & C. 8; 24 Vict. c. 10, s. 10. See, also, Richardson v. Whitney, 18 Pick. 530.

4. See, generally, Weeks on Att'ys, § 372 *et seq.*; notes, Evans Agency (Ewell's ed.), 497.

5. Wylie v. Coxe, 15 How. 415; Newbert v. Cunningham, 50 Me. 231; Sexton v. Pike, 13 Ark. 193; Andrews v. Morse, 12 Conn. 444; Walker v. Sargeant, 14 Vt. 247; Martin v. Hawks, 15 Johns. 405; Rooney v. Second Avenue R. R. Co., 18 N. Y. (anno. reprint) 368; Carter v. Davis, 8 Fla. 183; Waters v. Grace, 23 Ark. 118.

6. Wright v. Cobleigh, 21 N. H. 339; Wells v. Hatch, 43 id. 246; Cozzens v. Whitney, 3 R. I. 79; McDonald v. Napier, 14 Ga. 89; Elwood v. Wilson, 21 Iowa, 523; Mansfield v. Dorland, 2 Cal. 507; Dodd v. Brott, 1 Minn. 270.

7. Dubois' Appeal, 33 Penn. St. 231; La Framboise v. Grow, 56 Ill. 197; Hill v. Brinkley, 10 Ind. 102; Frissell v. Haile, 18 Mo. 18.

8. See, generally, Tiffany Agency, 475; New York Factors Act, Laws 1839, c. 179, reprinted in Tiffany Agency, App. p. 477 *et seq.* Consult the local statutes of other States.

9. Hawkes v. Dunn, 1 Crom. & Jer. 519; Feise v. Wray, 3 East, 93.

consignment the agent is indebted to his principal on the general balance of account to a greater amount than the value of the goods, and if such consignment has been made in order to cover his balance.[1]

Nor does this right exist if the agent is only a surety for the price of the goods.[2]

The right of stoppage *in transitu* may be exercised either by obtaining actual possession of the goods, or by giving notice of the claim to the person in whose custody they are during the transit.[3]

CHAPTER VI. [379].

RIGHT OF AGENT AGAINST THIRD PARTIES.

SECT. 1. *Upon Contracts.*

An agent is entitled to bring an action against third persons upon contracts to which they are parties —

(1) Where the agent has contracted personally.
(2) In certain cases where the agent is the real principal.
(3) Where the agent has a special interest in the subject-matter of the contract.
(4) In some cases where money is paid on contract which turns out to be illegal, or where it is paid by mistake.

Firstly. Where the agent has contracted personally.

It is a well-established rule of law that when a contract not under seal is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it,[1] the defendant, in the latter case, being

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1. Wiseman v. Vandeputt, 2 Vern. 203; Vertue v. Jewell, 4 Camp. 31.
2. Siffken v. Wray, 6 East, 371.
3. Northey v. Field, 2 Esp. 613; Litt v. Cowley, 7 Taunt. 169. See Newhall v. Vargas, 13 Me. 93; Mottram v. Heyer, 5 Den. 629.

1. See *ante;* Taintor v. Prendergast, 3 Hill, 72; Huntington v. Knox, 7 Cush. 371; Chandler v. Coe, 54 N. H. 561; Culver v. Bigelow, 43 Vt. 249; Saladin v. Mitchell, 45 Ill. 79.

entitled to be placed in the same position, at the time of the disclosure of the real principal, as if the agent had been the real contracting party.

Secondly. Where the agent is the real principal.

The mere fact that the agent has contracted as agent will not disentitle him to sue.[2]

Thirdly. When the agent has a special interest.[3]

Fourthly. When money is paid by mistake or under illegal contract.[4]

Where the agent sues in his own name the defendant may avail himself of all defenses which would be good at law and in equity.[5]

SECT. 2. *Rights of agent against third parties in tort.*

Any special or temporary ownership of goods, with immediate possession, is sufficient to maintain an action for conversion.[6]

A factor, or a bailee, or any other person with a right of his own, however special or trivial, has a property sufficient for the purposes of this action, and as against a mere wrongdoer, may recover the whole value of the property, being accountable over to the general owner.[7]

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2. Raynor v. Grote, 15 M. & W. 359.

3. Whitehead v. Potter, 4 Ired. Law, 357; Murray v. Toland, 3 Johns. Ch. 569; Toland v. Murray, 18 Johns. 24.

4. Stevenson v. Mortimer, Cowp. 805.

5. See *post.*

One who is simply employed to sell goods and pay over to his employer the money received from the sales, *has no authority to exchange such money with a third person; and, if he does so, and receives in exchange a counterfeit bill, he may maintain an action in his own name* to recover back the money paid out him for it; and it is not necessary, before bringing such action, to offer to return the counterfeit bill. Kent v. Bornstein, 12 Allen, 342.

See, also, Hungerford v. Scott, 37 Wis, 341, where an action by a steamboat agent to recover from a purchaser the difference between the price received by him and the schedule price of tickets sold, which he had paid to the company, the tickets being sold by the agent by mistake for less than the schedule price, was held not to lie.

6. Legg v. Evans, 6 M. & W. 36.

See this subject fully considered in Cooley on Torts, pp. 442-447.

7. Cooley on Torts, 447; Edwards on Bailments, §§ 37, 69, 103 *et seq.*, 329.

CHAPTER VII. [395].

THE RIGHTS OF THE PRINCIPAL AGAINST THIRD PARTIES.

SECT. 1. *The right to sue on contracts of agent.*

Those acts or contracts of an agent which render the principal liable to third parties impose upon the third parties themselves a reciprocal obligation to the principal; and the principal may enforce those rights by action.[1]

The right of the principal to sue is paramount to that of the agent, and in cases where either may bring an action, the former, by giving notice to the other contracting party, puts an end to the agent's right of action, except in cases where the agent has a lien upon the subject-matter of the action equal to the claim of the principal.[2]

SECT. 2. *The right of the principal to recover money wrongfully paid or applied.*

Where a man pays money by his agent which ought not to have been paid, either the agent or [405] **his principal may bring an action to recover it back.** The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent.[3]

SECT. 3. *The right of the principal to follow property wrongfully conveyed or its proceeds.*

Whenever the property of a party has been wrongfully misapplied, or a trust fund has [406] **been wrongfully converted into another species of property, if its identity can**

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1. See Conklin v. Leeds, 58 Ill. 178; Barber v. Garvey, 83 id. 184; Machias Hotel Co. v. Coyle, 35 Me. 405.

Otherwise, if the contract is under seal. Briggs v. Partridge, 64 N. Y. (anno. reprint) 357.

2. See Taintor v. Prendergast, 3 Hill, 72, and Sadler v. Leigh, 4 Camp. 195.

3. Sadler v. Evans, 4 Burr. 1984; Stevenson v. Mortimer, Cowp. 805; Farmers' & M. Bank v. King, 57 Penn. St. 202.

be traced, it will be held, in its new form, liable to the rights of the original owner or cestui que trust.[4]

SECT. 4. *The right to rescind contracts affected by fraud.*[5]

Any surreptitious dealing between one principal and the agent of another principal is a fraud upon the latter of which courts of equity will take cognizance.

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[439] CHAPTER VIII.

LIABILITY OF PRINCIPAL TO THIRD PARTIES.

[440] SECT. 1. *On contracts of agent.*[1]

A principal is liable to third parties for whatever the agent does or says; whatever contracts, representations or admissions he makes; whatever negligence he is guilty of, and whatever fraud or wrong he commits, provided the agent acts within the scope of his [real or] apparent au-

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4. Story, Eq. Jur. § 1258 *et seq.*

If an agent mingles his principal's money with his own, so that it cannot be followed, the principal can not recover it specifically. But the agent does not convert himself into a mere debtor; the principal may claim from the admixture the sum which belonged to him. Farmers' and M. Bank v. King, 57 Penn St. 202. See School District v. First Nat. Bank, 102 Mass. 174.

5. As to revocation of the agent's authority by his fraudulent acts, see *ante.*

See 2 Story Eq. Jur. §§ 794-8, where it is stated that "compensation or damages, it would seem, ought ordinarily to be decreed in equity only as incidental to other relief sought by the bill, and granted by the court, or where there is no adequate remedy at law; or where some peculiar equity intervenes." Where, however, specific performance is impossible for the reason that the title is defective, or the vendor has incapacitated himself from performing the contract, compensation may, as it seems, be decreed. See Greenaway v. Adams, 12 Ves. 401; Woodcock v. Bennett, 1 Cow. 711; Milkman v. Ordway, 106 Mass. 232. See, however, *contra*, cases cited in note to Evans Agency (Ewell's ed.), 574-575.

1. The subjects treated in this chapter have already been considered *ante*, and hence further treatment here is unnecessary. The student may, however, read with profit the discussion of the cases in the original text, p. 576 *et seq.*, Ewell's edition.

thority, and provided a liability would attach to the principal if he was in the place of the agent.[2]

But the agent alone is liable in the following cases:

Where he covenants personally in instruments under seal.[3]

Where he contracts personally in negotiable instruments.[4]

Where exclusive credit is given to the agent, the principal being known.

Where an agent commits a wilful wrong.

Although, however, a principal cannot by secret limitations of an agent's apparent authority free himself from liability upon contracts of the agent based upon his apparent authority, yet this rule will have no operation where the third party has notice that the agent is acting in violation of his instructions.[5]

SECT. 2. *For fraud and misrepresentation of agent.*

A principal is answerable [to third parties] where he has received a benefit from the fraud of his agent, acting within the scope of his authority, or where the fraud was committed by the agent in the course of his principal's business and for his benefit.[6]

SECT. 3. *Liability of principal for agent's acts and negligence.*

A principal, master or employer is liable to third parties for results due to the agent's acts and negligence when he is acting within the scope of his authority; but if the agent or servant is not acting within the [real or apparent] scope of his employment the employer is not liable for his negligence.[7]

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2. See Holmes v. Mather, L. R., 10 Ex. 261. To the same point, see N. Y. Life Ins. Co. v. McGowan, 18 Kan. 300; Mass. Life Ins. Co. v. Eshelman, 30 Ohio St. 647; Planters' Ins. Co. v. Sorrells, 57 Tenn. 352; Noble v. Cunningham, 74 Ill. 51; Bass v. C. & N. W. R'y Co., 42 Wis. 654. Consider, also, *ante*.

3. Considered *ante*.

4. Considered *ante*.

5. See Howard v. Brouthwaite, 1 Ves. & B. 209.

6. See Allerton v. Allerton, 50 N. Y. (anno. reprint) 670; Big. L. Com. Torts, 23 *et seq*.

7. The test of the master's responsibility is not the motive of the ser-

[494] SECT. 4. *Inevitable necessity—Vis major—Act of God.*

It may be important to consider whether the damage for which it is alleged the principal is responsible was due to the agent's default or negligence, or whether it was not rather due to an inevitable and irresistible necessity. The principles applicable to this branch of law pervade the whole law of torts.[8]

SECT. 5. *The effect of intrusting performance of work to a contractor.*

The general rule is well established, that if the person on whose behalf a particular work is done intrusts the execution of the work to a person whose calling is to perform work of that kind, and who is master of the workmen employed, having control over them, he is not liable for injuries done to third persons from the negligent execution of the work.[9]

This rule is, however, subject to the following exceptions:

(1) Where the work which is intrusted to the independ-

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vant, but whether that which he did was something his employment contemplated, and something which if he should do it lawfully, he might do in the employer's name." See the cases collected and considered in Cooley on Torts, 535-538, notes.

The question whether a corporation is liable for the tortious acts of its agents or servants, is to be determined by the same principles as determine the question of the liability of a master for the torts of his servants. Brokaw v. N. J. R. R. Co., 32 N. J. Law, 328; Cooley on Torts, 119. The same principles apply whether the corporation be private or municipal. Cooley on Torts, 122.

A corporation is not, however, liable for such wrongs by its agents, as are beyond the scope of its corporate authority. If its agents undertake to do what the corporation is not empowered to do, their action will not impose any liability upon the corporation. See Cooley on Torts, 119; Dill. Mun. Corp. § 761.

An action of trespass for an assault and battery will lie against a corporation. Cooley on Torts, 119, 120; Brokaw v. N. J. R. R. Co., *supra*.

8. See Smith v. Kenrich, 7 C. B. 564; Fletcher v. Rylands, L. R. 1 Ex. 265; id. 3 H. L. 330; Cooley Torts (Stud. ed.), 581, 642.

9. Cuthbertson v. Parsons, 12 C. B. 304; Milligan v. Wedge, 12 Ad. & E. 737; Forsythe v. Hooper, 11 Allen, 419; Kelly v. Mayor, etc. of New York, 11 N. Y. (anno. reprint) 432. As to who is a contractor, see Cooley on Torts (Stud. ed.), 477.

ent control of another involves the performance of a duty which is incumbent upon the person by whom the work was so intrusted.[1]

(2) Where a person is in possession of fixed property, [500] which is so managed or dealt with that injury results to another, the former will not escape liability by reason of the fact that he has employed an independent and competent contractor.[2]

Where the employer retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor as his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent.[3]

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[504] CHAPTER IX.

LIABILITY OF EMPLOYER FOR INJURY CAUSED BY NEGLIGENCE OF FELLOW-WORKMAN.

The earliest reported case in which the liability of the master for damage resulting from the negligence of a fellow servant[4] was discussed was Priestly v. Fowler,[5] a decision of the Court of Exchequer in the year 1837.

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1. See Silvers v. Nerdlinger, 30 Ind. 53; Detroit v. Corey, 9 Mich. 165, and cases there cited; Darmstaetter v. Moynahan, 27 id. 188.

2. See Silvers v. Nerdlinger, *supra;* Chicago v. Robbins, 2 Black, 418; Clark v. Fry, 8 Ohio St. 358.

3. Cincinnati v. Stone, 5 Ohio St. 38; Chicago v. Joney, 60 Ill. 383; Sewall v. St. Paul, 20 Minn. 511.

See Bush v. Steinman, 1 B. & P. 404; Martin v. Temperley, 4 Q. B. 298, and cases *infra;* 10 C. B., N. S. 470. See Clapp v. Kemp, 122 Mass. 481.

4. The cases holding that the master is not liable for injury to his servant resulting from negligence of other servants in the same employment, are very numerous. A large number will be found collected in Cooley on Torts, 542, note; id. (Stud. ed.), 541. See, also, Bigelow's Lead. Caces on Torts, 709. This topic is more properly treated in a work on negligence or torts. Besides the works already cited, see Bevins on Negligence (2 vols. 1908); Shearman & Redfield Negligence (3 vols. 1913).

This subject has also been the object of more or less legislation. As the statute law upon the subject is in a

The judgment of the court was delivered by the Chief Baron, Lord Abinger, who in concluding his judgment that the master was not liable, stated that "**to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him.**"

This case has been followed by numerous others and where not changed by statute is the general rule of law.[6]

There are, however, some limitations to the rule:

"Whether invited upon his premises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it, to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, and not open to observation. It is a rule of justice and right, which compels the master to respond for a failure to exercise this care and prudence."[7]

So, also, "it is negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so."[8]

If, however, the plaintiff knew, or ought reasonably to have known, the precise danger to him of the machinery or structure in question, and still continued in the master's employment, he may be held to have assumed the extraordinary risk thus created.[9]

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transition state, the student should be careful always to consult the local statutes and the decisions construing the same.

5. 3 M. & W. 1.

6. See Cooley on Torts, *542 *et seq.*; Id. (Stand. ed.) 541; Big. Lead. Cas. Torts, 709.

7. Cooley on Torts, 550; Marshall v. Stewart, 2 Macq. H. L. 20; Indermaur v. Dames, L. R., 2 C. P. 311.

8. Cooley on Torts, 559; Lansing v. N. Y. Cent. R. R. Co., 49 N. Y. (anno. reprint) 521; Patterson v. Pittsburg, etc. R. R. Co., 76 Penn. St. 389.

9. Dorsey v. Phillips, etc. Construction Co., 42 Wis. 583; Laning v. N. Y. Cent. R. R. Co., 49 N. Y. (anno. reprint) 521.

SMITH ON CONTRACTS.

THE LAW OF CONTRACTS.

SMITH ON CONTRACTS.

LECTURE I.

ON THE NATURE AND CLASSIFICATION OF CONTRACTS, AND ON CONTRACTS BY DEED.

The whole practice of our English Courts of Common Law,[1] if we except their criminal jurisdiction and their administration of the law of real property, to which may be added those cases which fall within the fiscal jurisdiction of the Court of Exchequer, **may be distributed into two classes, Contracts and Torts.** [1]

All contracts are divided by the Common Law of England into **three classes:** —

1. **Contracts by matter of record.**[2] [2]
2. **Contracts under seal.**[3]
3. **Contracts not under seal, or simple contracts.**

A record is a memorial or remembrance on rolls of parchment; and such memorial is not a record until enrolled in the proper office.[4] [3]

The only contract of record with which we now occa-

1. See Supreme Court of Judicature Acts, 36 & 37 Vict., c. 66 (1873), vol. 1, Blackstone.

2. Contracts of record are (1) judgments pronounced in litigated cases or by consent; and (2) recognizances which are always by consent. See, generally, Clark on Contracts (3d Ed., 1914), 60 *et seq.*; O'Brien v. Young, 95 N. Y. (Anno. Reprint), 428, and cases cited in note.

3. Called deeds on specialties. See Clark on Contracts (3d Ed.), 62 *et seq.*

4. Enrollment is not necessary as a rule in this country. See pleading, record.

sionally meet is a **recognizance**, and that oftener in matters in which the crown is concerned, than between subject and subject.

The peculiar incidents of contracts of record are, first, that, like all records, **they prove themselves**; that is, their bare production, without any further proof, is sufficient evidence of their existence, should it be controverted.[5] [4]

Secondly, that, **if it become necessary to enforce them, that may be done by writ of scire facias**,— a writ which lies on a record only, and cannot [unless authorized by statute] be made use of for the purpose of enforcing any other description of contract.[6]

An obligation by record, however, may be discharged by a deed of release, though a deed is a matter of inferior degree.[7]

The other two classes of contracts are those which are of most practical importance. These are: —

1. Contracts by deed.
2. Contracts without deed, or simple contracts.

1. **With regard to contracts by deed: —**

A deed is a written instrument, sealed and delivered. [5]

First, **it is a written instrument**, and this writing, the old books say, must be **on paper or parchment**; for if it were written on linen, wood, or other substance, it would not be a deed.[8] But though every deed must be written, **it is not necessary that every such instrument should be signed**, for at common law, signature was not essential;[9] and although by several statutes, particularly **the statute of frauds**, *signature* has been rendered essential to the validity of certain specified contracts, yet there are many contracts which are not affected by any statute; and to these last-mentioned contracts, and also to those which are the subject of several

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5. See pleading; *nul tiel* record, as to what constitutes a record.

6. An action of debt is also a common way of enforcing a judgment; in fact, it is the only way when enforcement is sought in another state.

7. Barker v. St. Quintin, 12 M. & W. 441.

8. It is doubtful whether at the present day this old rule would be followed. See Clark on Contracts (3d Ed.), 63, note 11.

9. Usually signed, however. See, generally, Shep. Touch, 56; Clark on Contracts (3d Ed.), 63 and notes.

sections of the statute of frauds, *if entered into by deed*, signature is not necessary.[1]

Secondly, **it must be sealed and delivered.** [6] This is the main distinction between a *deed* and any other contract. **The seal is an indispensable part** of every deed,[2] and so, except in case of the deed of a corporation, is the **delivery.** From this delivery it is a perfect deed, taking its effect from this essential part of its completion.[3] **After delivery it cannot be altered,** not even by filling up a blank. "**A deed may be delivered by words without actual touch, or by touch without words.**" However, **in practice, it is always safest and most advisable to follow the ordinary and regular course,** which is, to cause the person who is to deliver the deed to place his finger on the seal, thereby acknowledging the seal to be his seal, and state that he delivers the instrument as his act and deed.[4] [7]

It is not necessary that the delivery should be to the person who is to take the benefit of the deed. Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in

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1. Bac. Ab., Obligations, C. See, however, Miller v. Roble, 15 W. N. C. (Pa.) 431; Wash. Real Prop. (4th Ed.), *553; Clark on Contracts (3d Ed.), 63 and notes.

2. A common law seal is an impression upon wax, wafer, or any other tenacious substance capable of receiving an impression. Warren v. Lynch, 5 John. 244. It is now sufficient if it be on the paper itself. By statute in some states a scrowl or scrawl made with the pen or printed on the paper is sufficient. See Clark on Contracts (3d Ed.), 63, 64 and notes.

3. Goddard's Case, 2 Rep. 4 b.

4. With regard to delivery, it is not absolutely necessary that the party executing should take the instrument into his hand and give it to the person for whose benefit it is intended; but as it is said by Lord Coke: "*a deed may be delivered by words without actual touch, or by touch without words.*" "The delivery," his Lordship says, "is sufficient without any words; for, otherwise, a man who is mute could not deliver a deed. * * * And, as a deed may be delivered to the party without *words*, so may a deed be delivered by *words* without any *act* of delivery; as, if the writing sealed lieth on the table, and the feoffor or obligor saith to the feoffee or obligee, 'Go and take up the writing, it is sufficient for you, *or* it will serve the turn, *or* take it as my deed,' or the like words, it is a sufficient delivery." See Co. Litt., 36 a; Doe v. Bennett, 8 C. & P. 124; Clark on Contracts (3d Ed.), 65 *et seq.*, and cases cited.

the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed; and delivery to the party who is to take by it, or any other person for his use, is not essential. Delivery to a third person for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery.[5] [8]

An escrow is a deed delivered conditionally to a third person, to be delivered to the person for whose benefit it purports to be, on some condition or other. If that condition be performed, it becomes an absolute deed; till then it continues an escrow, and, if the condition never be performed, it never becomes a deed at all.[6]

This conditional delivery must be to some third person; for if it were to the party himself who is to be benefited, the deed would become absolute, though the party delivering were to say in express terms that he intended it to be conditional only.[7] [10]

Where, however, the deed is delivered to a third person as an escrow, when the condition has been performed, **it becomes absolute and takes effect, not from the date of performing the condition, but from the date of the original delivery.**[8] [11]

In order to make a writing sealed and delivered an escrow merely, **it is not necessary that express words should be used.** All the facts attending the execution, and all that took place at the time, are to be looked to; and although it be in form an absolute delivery, if it can reasonably be inferred that the writing was not to take effect as a deed till

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5. Doe v. Knight, 5 B. & C. 671; Belden v. Carter, 4 Day (Conn.), 66; Stone v. Duvall, 77 Ill. 475; Clark on Contracts (3d Ed.), 65 *et seq.*, and notes.

6. Shep. Touch, 58; Clark on Contracts (3d Ed.), 67 and cases cited. Recording an escrow without performance and delivery passes no title. Stanley v. Valentine, 79 Ill. 544.

7. Holford v. Parker, Hob., 246; Fairbanks v. Metcalf, 8 Mass. 230; Stevenson v. Crapnell, 114 Ill. 19; Braman v. Bingham, 26 N. Y. (Anno. Reprint) 483; Clark on Contracts, 68 and note.

8. Graham v. Graham, 1 Ves. Jr. 272; Clark on Contracts (3d Ed.), 68, 69.

a certain condition should be performed, it will operate as an escrow.[9]

Deeds are divided into two classes, Deeds Poll and Indentures; a Deed Poll being made by one party only, an Indenture between two or more parties.[1] [12]

A contract by deed requires no consideration to support it; or perhaps it might be more correct to say, as a general proposition, that the law conclusively presumes that it is made upon a good and sufficient consideration.[2] [13]

There are, however, some deeds deriving their effect from the statute of uses, that is, **a bargain and sale, and a covenant to stand seised to uses**, both of **which are void without a consideration**; the first requiring a pecuniary one,

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9. Bowker v. Burdekin, 11 M. & W. 128.

1. The names of deed poll and indenture were derived from the circumstance that the former was shaved or *polled*, as the old expression was, smooth at the edges, whereas the latter was cut or indented with teeth like a saw; for, in the very old times, when deeds were short, it was the custom to write both parts on the same skin of parchment, and to write a word in large letters between the parts; and then, this word being cut through, saw fashion, each party took away half of it; and if it became necessary to establish the identity of the instrument at a future time, they could do so by fitting them together, whereupon the word became legible. Co. Litt., 229 a. See 2 Bl. Com. (vol. 1) *295. However, this, though the origin of the word *indenture*, has become a mere form; and though such instruments are still indented by nicking the edge of the parchment, not teethwise, but in an undulating line, that is a mere form, and might (as it was said in Shubrick v. Salmond, 3 Burr. 1639), be done in court during the progress of a trial if it had been forgotten till then. See, generally, Clark on Contracts (3d Ed.), 69.

2. Cooch v. Goodman, 2 Q. B. 590.

"At common law no consideration was requisite to the validity of a deed, but since the introduction of conveyances taking effect by virtue of the Statute of Uses, courts of equity, and then courts of law, have held a consideration necessary to support such an instrument. It need not be expressed in the deed, but may be proved. But if expressed, the language of the instrument, so far as the legal effect of the deed is concerned, is conclusive (Preston on Abstracts, 14), and although in America, there is a numerous class of cases deciding that the consideration may, by parol, be shown to be greater or less, than is expressed, yet on neither side of the Atlantic is such evidence admitted to defeat the legal effect of the deed as between the parties. Wilt v. Franklin, 1 Binn. 502; Hurn v. Soper, 6 Harr. & Johns. 276. Where the rights of *creditors* step in, the rule is different. Preston, *supra*, 1 Am. Lead. Cases, 1." Note by Mr. Rawle, page 13, Smith on Contracts.

and the latter a consideration of blood or marriage. **Contracts in restraint of trade also are void**, if made without consideration, although under seal.[3] [17]

Though, however, it is not necessary to show on what consideration a deed is founded, **a party sued on it is always, on his part, allowed to show that it is founded on an illegal or immoral consideration, or that it was obtained by duress or by fraud.** It signifies not whether the illegality objected to it be a breach of the rules of common law, or consist in the contravention of the provisions of some statute, or whether the prohibition of the statute be expressed in direct terms, or be left to be collected from a penalty being inflicted on the offender.[4] **A contract, although not expressly prohibited by a statute, may be illegal, if opposed to the general policy and intent thereof**, or if made in order to enable another to infringe that policy and intent. [19] **Even if there were several considerations, and any one of them was illegal, it avoids the whole instrument**; for it is impossible to say how much or how little weight the illegal portion may have had in inducing the execution of the entire contract. Though it is just the reverse where the consideration is good, and there are several covenants, some legal, some illegal; for then the illegal promises alone will be void, and the legal valid.[5]

The next quality of a contract of deed is its **operation by way of estoppel**; the meaning of which is, that the person executing it is not permitted to contravene or disprove what he has there asserted, though he may do so where the assertion is in a contract not under seal. [20]

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3. Mitchell v. Reynolds, 1 P. Wms. 181. See Wallis v. Day, 2 M. & W. 277; Horner v. Graves, 7 Bing. (20 E. C. L. R.) 744; Hutton v. Parker, 7 Dowl. 739; Mallan v. May, 11 M. & W. 665. See Tallis v. Tallis, 22 L. J. (Q. B.) 185; 1 E. & B. (72 E. C. L. R.) 39. See Hubbard v. Miller, 27 Mich. 15; Clark on Contracts, 69.

4. Collins v. Blantern, 2 Wils. 341; 1 Smith L. Cas. (8th Ed.) 387 and notes; Bartlett v. Vinor, Carth., 251; Cundell v. Dawson, 4 C. B. 376; Ritchie v. Smith, 6 C. B. 462; Cope v. Rowlands, 2 M. & W. 149; M'Kinnell v. Robinson, 3 M. & W. 434; Harris v. Runnels, 12 How. 79.

5. Saratoga County Bank v. King, 44 N. Y. (Anno. Reprint) 87 and note.

But an allegation must, in order to operate as an estoppel, be clear, distinct, and definite.

The estoppel has no effect in matters not depending upon that contract; thus even a party to a deed is not estopped in an action by another party, not founded on the deed but wholly collateral to it, from disputing the facts so admitted therein. [22]

If all the facts appear by the deed, a party thereto is not estopped from averring them, although they are contradictory to some part of the deed.

As the deed takes effect from the delivery, not from the date, **neither party can be estopped from showing the real date of the delivery,** although by doing so a very different meaning may be given to the deed from that which would be given to it if the parties were esopped from denying that the date was the time from which the deed commenced in effect.[6] [24]

"**There be three kinds of estoppels,** viz., by matter of record, by matter in writing (*i. e.*, by deed), and by matter *in pais*. [25] **By matter of record,** viz., by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance,"—some of which records are now obsolete. "**By matter in writing,** as by deed," of which we have already treated. "**By matter in pais,** as by livery, by entry, by acceptance of rent, by partition, by acceptance of an estate, whereof Littleton maketh a special observation that a man shall be estopped by matter in the country without any writing."[7]

As to estoppels in pais, it is laid down "that, where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position; the former is concluded from averring against the latter a different state of things as existing at the same time."[8] [26] By the term "wilfully," however, in that rule, we

6. See, generally, as to estoppel by deed, Clark on Contracts (3d Ed.), 69-71 and notes.

7. Co. Litt., 352.

8. See Pickard v. Sears, 6 A. & E. 474; Manufacturers', etc., Bank v. Hazard, 30 N. Y. (Anno. Reprint) 226 and note.

must understand, if not that the party represents that to be true, which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.'"[9]

The next peculiarity in a contract by deed is its effect in creating a merger. [27] This happens when an engagement has been made by way of simple contract, that is, by words in writing not under seal, and afterwards the very same engagement is entered into between the same parties by a deed. When this happens, the simple contract is merged, lost, sunk, as it were, and swallowed up in that under seal, and becomes totally extinguished.[1]

But the engagement by deed must be so completely identical with that by the simple contract, that the remedy upon the deed must be coextensive with the remedy upon the simple contract, else there is no merger.[2] [28]

The obligation of a deed cannot be got rid of by any matter of inferior degree:[3] thus a verbal license will not exempt a man from liability for breach of his covenant.[4] [29]

It is another advantage of a contract by deed over a simple contract, that although, as is well known, a chose in action is not assignable by [the common] law, yet, where the contract is one between landlord and tenant, and is such

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9. Freeman v. Cooke, 2 Ex. 663, per Parke, B.

1. Clark on Contracts, 71; Hutchins v. Hebbard, 34 N. Y. (Anno. Reprint) 24; Banorgee v. Hovey, 5 Mass. 11.

2. See the leading case of Cumber v. Wane, 1 Strange, 426; 1 Smith's Lead. Cas. *439 and notes.

3. Wood v. Leadbitter, 13 M. & W. 838.

4. This rule of law has not been generally followed in this country. See Fleming v. Gilbert, 3 Johns. 528; Leavitt v. Savage, 16 Me. 72.

as in its nature to affect directly the estates of either of them, which in law is called running with the land, the benefit and the burden of that contract when under seal will, if the estate of either is assigned, pass with the reversion or the term to the new landlord or to the new tenant.[5] [30] This is partly by force of the common law, and partly by force of the stat. 32 Henry VIII., c. 34, an act passed shortly after the dissolution of the monasteries, and rendered necessary thereby.

Again, a deed has this further advantage of a simple contract, that, in case of the death of the party bound by it, it charges his heirs (if the deceased bound his heirs by using words for that purpose in the deed) to the extent of any assets that may have descended to them.[6] [31]

In the administration of the personal effects, also, the specialty creditors used to have [prior to the enactment of 32 & 33 Vict. c. 46, sect. 1] a priority over those by simple contract. [32]

The occasions on which for the most part a deed is necessary must now be mentioned. Real property of the corporeal kind being capable of actual delivery may, by the common law, be aliened or transferred by delivery alone without deed, and is therefore said to lie in livery; while that of the incorporeal kind, being incapable of delivery, requires some other mode to be used for authenticating its alienation or transfer, which mode is a deed, and therefore such property is said to lie in grant. [33] Thus in Wood *v.* Leadbitter, 13 M. & W. 838, a ticket of admission to the Grand Stand at Doncaster to see the races, issued by the steward, and for which the holder had paid a guinea, was held, not being under seal, to convey to him no right to be there, and no remedy for having been put out. For the transfer, therefore, of incorporeal property a deed is necessary.[7]

As a general rule, chattels real and personal of tangible

5. See Spencer's Case, 5 Coke Rep. 16; 1 Smith's Lead. Cas. (8th Ed.) 68 and notes.

6. In this country lands are generally liable for all the debts of the deceased, whatever the nature of the contract by which they are evidenced.

7. See Blackstone, vol. 1 of this series, title, Livery, Hereditament.

or corporeal natures may, at common law, be granted without deed. And although an estate of inheritance or freehold cannot be granted upon condition without deed, yet a chattel, real or personal, may be so granted by mere parol.[8] [34]

There is also a great **difference between the effect of a gift of chattels by mere word of mouth, and a gift of chattels by deed.** In the former case, after the gift and before something has been done or said by the donee to show his acceptance of the thing given, the gift is revocable.[9] **But if the gift be by deed, it vests in the donee upon the execution of the deed,** and is irrevocable by the donor until it is actually disclaimed by the donee. After such execution, and before such disclaimer, the estate is in the donee without any actual delivery of the chattel given.[1]

A deed is also necessary for authorizing an agent to execute a deed for another.[2] [35] It is also, as will hereafter appear, **necessary to a grant by a corporation.**

Lastly, with regard to **the remedy upon a contract by deed:** wherever a promise is made by deed, the performance may be enforced by an **action of covenant;** and **if a liquidated debt be secured by it, by an action of debt.**[3] [36]

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8. Reeves v. Capper, 5 Bing. N. C. 136.

9. 2 Rolles' Abr. 62.

1. Siggers v. Evans, L. J. (Q. B.) 305, 5 E. & B. 367; Rowe v. Ware, 30 Geo. 278.

2. Harrison v. Jackson, 7 T. R. 207.

3. See this volume, Pleading.

LECTURE II. [38]

THE NATURE OF SIMPLE CONTRACTS; — OF WRITTEN CONTRACTS; — THE STATUTE OF FRAUDS.

Simple contracts comprise all of a degree inferior to deeds, whether they be verbal or written.[4]

They are so far alike that they all, whether verbal or written, are subject to those marks of inferiority to contracts by deed which were described in the last lecture. Thus they do not cerate an estoppel. They are capable of being put an end to without the solemnity of a deed. They form no ground of action against the heir or devisee, even though he be expressly named in them; and they require a consideration to support and give them validity, though, as will be hereafter explained, there is one case, even among simple contracts, in which the consideration need not be shown, but is presumed to exist, unless its existence can be disproved. [39] In these respects, all simple contracts are like one another.

But there are **two great practical differences between verbal and written contracts.** The first concerns *the mode in which they are to be proved.* **When a contract is reduced into writing, it shall be proved by the writing, and by that only.**[5] If instead of being constituted by the parties the expositor of their intentions, a written instrument is constituted such by a positive rule of law, the same result must follow. Thus when by **the statute of frauds** operation is given to a written instrument exclusively, the object of the statute would be defeated if parol evidence were admitted in lieu of the required writing, or in any way to alter it.

The rule itself is, that no *parol,* that is, *verbal,* evidence of what took place at the time of making a written contract is admissible for the purpose of *contradicting* or *altering* it.[6] [41] And as verbal evidence of what took place at the time of making a written contract cannot be given to show that the meaning of it is different from what its words im-

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4. See Beckham v. Drake, 9 M. & W. 79; Clark on Contracts, 58, 59.

5. See this volume, Evidence.

6. Id.

port, so neither can evidence that the parties *have acted* upon the supposition of its being different have that effect. [43]

But though you cannot be allowed to show that the meaning of a written contract was varied, *at the time of making it*, by words merely spoken, there are some cases in which **you may show that it was subsequently so varied.** These are cases in which the contract, although written, is of a description which is not required by law to be reduced into writing at all.[7] [44]

But though this may be done where the contract is one which the law does not require to be in writing, yet **where a writing is necessary, it cannot be allowed.**[8] [45]

Another distinction on this subject is, that **in a written contract, or, indeed, in any other written instrument, if there be a patent ambiguity, it never is allowed to be explained by verbal evidence, although a latent ambiguity is so.**[9] [45]

A patent ambiguity is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible: as if in a will there were a *blank* left for the devisee's name. [46]

A latent ambiguity is where the instrument itself is on the face of it intelligible enough, but a difficulty arises in ascertaining the identity of the subject-matter to which it applies, as if a devise were to *John Smith* without further description.

Another exception occurs where parties have contracted with reference to some known and established usage.[1] [51] In such cases the usage is sometimes allowed to be engrafted on the contract, in addition to the express written

7. Goss v. Lord Nugent, 5 B. & Ad. 58; Dearborn v. Cross, 7 Cow. 50; Cummings v. Arnold, 3 Metc. 486. See, also, Gincher v. Martin, 9 Watts, 109; Negley v. Jeffers, 28 Ohio St. 100; Longfellow v. Moore, 102 Ill. 289.

8. Goss v. Lord Nugent, *supra*.

9. See Bacon's Maxims, reg. 23; Dodd v. Burchell, 31 L. J. (Ex.) 364; Clayton v. Lord Nugent, 13 M. & W. 200; Petit v. Shepard, 32 N. Y. (Anno. Reprint) 97 and note; Bell v. Woodward, 46 N. H. 315.

1. Wigglesworth v. Dallison, Dougl., 201; 1 Smith's L. C. (7th Am. Ed.) *670 and notes.

terms. When they have so contracted, the reference in their minds to the usage is similar to that reference which exists in all men's minds (when making a contract) to the general law. [52] In the latter case they intend that where their contract is silent, their rights shall be those which the general law annexes to the stipulations which they have expressed; and in the former they intend that the rules which the usage of the place or trade annexes, shall regulate their rights in those particulars in which their agreement is silent. In both cases **they can exclude the general law or the usage by their stipulation,** and in both are liable to the general law or to the usage where their contract does not exclude their operation, by showing expressly or impliedly that they did not intend to be bound by it.

Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contracts, had made use of a foreign language, which the courts are not bound to understand.[2] [60]

But although usage may be admissible to explain what is doubtful, it is never admitted to contradict what is plain.[3] [64]

If plain and ordinary terms and expressions, to which an unequivocal meaning belongs, which is intelligible to all, are used, that plain sense and meaning ought not to be altered by mercantile understanding and usage. [66]

In the application of all these rules, evidence of words being used in a certain sense, or that certain incidents are annexed by custom in certain places and amongst certain classes of persons, does not raise a conclusion of law that the contracting parties used the terms in those senses, or that the incident must necessarily be annexed, but is only evidence from which a jury may draw the conclusion that such was the meaning of the parties, or such the custom or

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2. Robertson v. Jackson, 2 C. B. 412.

3. Blacket v. Insurance Co., 2 C. & J. 244.

usage.[4] [67] And although evidence of usage may be received to explain the written contract, yet, when the jury have decided on the meaning of the term, it is not for them but for the court to put a construction upon the entire contract or document.[5]

If the contract itself be unusual, evidence of the usage and custom of the trade in the course of which the unusual contract arose, **ought not to be received** to explain it.[6]

An important practical distinction between simple contracts by mere words and simple contracts in writing is, that there are several matters, which, although they are capable of becoming the subjects of *Simple Contract*, cannot, nevertheless, be contracted for without *writing*, so as to give either party a right of action on such contract. [70]

By far the most important class of contracts subject to this observation are those falling within the enactments of **the statute of frauds.** [29 Chas. II., c. 3.]

The first of the twenty-five sections of which it consists is levelled at parol conveyances of land, and contains the celebrated enactment, that they shall create estates at will only. [71] **The second section excepts from this enactment the case of leases not exceeding three years** from the making thereof, and reserving two-thirds of the annual value as rent. **The third section forbids parol assignments, grants, or surrenders; the fifth is levelled at unattested devises; the sixth at secret revocations of devises; the seventh at parol declarations of trust; the nineteenth and twentieth against nuncupative wills of personalty; and the twenty-first against verbal alterations in written wills.** [72]

But the two sections which mainly affect contracts are the fourth and seventeenth.

The fourth section enacts: — "**That no action shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special**

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4. Clayton v. Gregson, 5 A. & E. 302.

5. Hutchinson v. Bowker, 5 M. & W. 535.

6. Lewis v. Marshall, 7 M. & G. 729.

promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."[7]

The contracts provided for by this section are: —

First. *Promises* by an *executor* or *administrator* to answer damages out of his own estate.

Second. Promises to answer for the *debt, default,* or *miscarriage of another person.* [73]

Third. Agreements made in consideration of *marriage.*

Fourth. Contracts or sales of *lands, tenements, or hereditaments, or any interest in or concerning them.*

Fifth. Agreements *not to be performed within the space of a year* after the making thereof.[8]

The latter part of the section applies equally to each of these five sorts of contracts, which are equally prohibited from being made the subject-matter of action, unless the *agreement* or some *note* or *memorandum* of it shall be in writing, signed by the party to be charged, or some person thereunto by him lawfully authorized.

It has been decided — and the decision was equally applicable to each of the five descriptions of contract — that **in consequence of the introduction of the word "agreement," the consideration as well as the promise must appear in writing.**[9] For the word *agreement*, comprehending

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7. Contracts within the statute are not illegal unless in writing, but only incapable of enforcement. The defence is a personal one and can only be relied on by parties or privies; and may be waived. Chicago Dock Co. v. Kinzie, 49 Ill. 289; Montgomery v. Edwards, 46 Vt. 151.

8. Contracts created by law; instruments created under and deriving their obligations from special statutes and executed contracts, are not within the statute. Clark on Contracts (3d Ed.), 78, 79.

9. Wain v. Warlters, 5 East, 10; 2 Smith's L. C. (7th Am. Ed.) *280.

what is to be done on both sides, comprehends of course the *consideration* for the promise, as well as the *promise* itself. This consideration must appear in express terms, or by necessary implication.[1] [76]

All the terms of the agreement, as well as the consideration, **must be expressed in the memorandum.**[2] Thus an agreement for a lease not specifying a definite term does not satisfy the requirement of the statute. [77] So if the names of both buyer and seller are not mentioned in the agreement, it is insufficient.

There is another observation applicable to all the five cases provided for by this section of the statute, namely, that **the agreement need not be contained in a single writing, but may be collected from several.**[3] [79] And it is not material that the letters, out of which the contract may be proved, are written to third parties, even to the writer's own agent, provided the contract be fully recognized therein. [83]

But though, where there are several papers, the agreement may be collected from them all, provided they are sufficiently connected in sense among themselves, so that a person looking at them all together can make out the connection and the meaning of the whole without the aid of any verbal evidence, yet it is otherwise when such connection does not appear on the face of the writings themselves.[4] [84]

There is a third point common to all the five contracts mentioned in the fourth section; it is with regard to the signature. [85] The words are, "*signed by the party to be charged* therewith, or some other person thereunto by him lawfully authorized." **This signature is most regularly and properly placed at the foot or end of the instrument signed; but although the signature be in the beginning or middle**

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1. The rule in Wain v. Warlters, though prevailing in a few states, has not been generally adopted in this country. See the cases collected and considered in a note by the editor of the 7th American Edition of the author on page *79. See, also, Clark on Contracts (3d Ed.), 108, 109 and notes.

2. Clark on Contracts, 101.

3. Id.; Jackson v. Lowe, 1 Bing. 9.

4. Boydell v. Drummond, 11 East, 142; Long v. Miller, 4 C. P. D. 456; Clark on Contracts, 101.

of the instrument, it is as binding as if at the foot; although if not signed regularly at the foot, there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. [86] But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and signed by him. But, of course, where it appears that, notwithstanding the insertion of the parties' names in the instrument, it was intended that their signatures should be affixed in the proper place, such an instrument would not be a compliance with the statute, as it could not be considered as signed by them.[5] [88]

The signature may be either in print or in pencil. There is also little or no doubt that a party may sign, within this statute, by **stamping his signature**, instead of writing it. It seems, too, that a **telegram** containing, as usual, the names of the sender and receiver, would be a sufficient writing signed, within the statute, to bind the sender.[6]

The signature is to be that of the party to be charged; and, therefore, though both sides of the agreement must appear in the writing, the consideration as well as the promise, **it is not necessary that it should be signed by both the parties**; it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to *charge*.[7] [89] And such a writing signed is sufficient to satisfy the fourth section, though it be only a proposal accepted by parol by the party to whom it is made.[8] The person, however, who seeks to enforce the agreement has not the other altogether at his mercy, but must either do, or be ready to do, his own part of the agreement, before he can seek performance on the part of the person who has signed.[9]

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5. Schneider v. Norris, 2 M. & W. 286; Clark on Contracts, 101.

6. Godwin v. Francis, 39 L. J. (C. P.) 121; Trevor v. Wood, 36 N. Y. (Ann. Rep.) 307. See especially the voluminous note at end of this case.

7. Laythoarp v. Bryant, 2 Bing. N. C. 735; Penniman v. Hartshorn, 13 Mass. 87. In New York the statute uses the word "subscribed." See Davis v. Shields, 26 Wend. 341.

8. Reuss v. Picksley, 2 Bing. N. C. 735.

9. Reuss v. Picksley, *supra*.

But although the written memorandum may be made and signed subsequently to the making of the contract, yet it must exist before an action is brought upon it.[1]

The last point common to all the contracts falling within *this* section regards the consequence of non-compliance with its provisions. **The consequence is, not that the unwritten contract shall be void, but that no action shall be brought to charge the contracting party by reason of it.** [90] And cases may occur in which the contract may be made available without bringing an action on it; and in which, consequently, it may, though unwritten, be of some avail. Thus if money has been paid in pursuance of it, that payment is a good one for all purposes.[2]

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1. Bill v. Bament, 9 M. & W. 36, *quaere*—see Fricker v. Tomlinson, 1 M. & G. 772.

2. Laythoarp v. Bryant, *supra;* Griffith v. Young, 12 East, 213; Philbrook v. Belknap, 6 Vt. 383. The doctrine of part performance, however, applies only to cases relating to land. Brittain v. Rossiter, 48 L. J. (Q. B.) 362; 11 Q. B. 123. See Equity.

LECTURE III. [92]

THE FOURTH SECTION OF THE STATUTE OF FRAUDS.— PROMISES BY EXECUTORS AND ADMINISTRATORS.— GUARANTIES.— MARRIAGE CONTRACTS.— CONTRACTS FOR THE SALE OF LAND.—AGREEMENTS NOT TO BE PERFORMED IN A YEAR.

The first species of contracts to which the fourth section of the act applies is, **any special promise by an executor or administrator to answer damages out of his own estate.**

The principal case on this subject is **Rann v. Hughes.**[3] [93] The point decided in that case is, that **the statute of frauds in no manner affected the validity of such promises, or rendered them enforceable in any case in which at common law they would not have been so; but merely required that they should be reduced into writing,** leaving the written contract to be construed in the same manner as a parol contract would have been, had there been no writing.

The next species of promise mentioned in the fourth section is, **any special promise to answer for the debt, default, or miscarriage of another person.** [95]

This includes all those promises which we ordinarily denominate **guaranties.** [96] In the first place, **the sort of promise which the statute means, and which must be reduced into writing, is a promise to answer for the debt, default, or miscarriage of another person, for which that other person himself continues liable.**[4] Thus if A go to a shop and say, "Let B have what goods he pleases to order, and if he do not pay you *I* will," that is a promise to answer for a debt of B for which B is himself also liable: and if it be sought to enforce it, it must be shown to have been reduced into writing: but if A had said, "Let B have goods

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3. 7 T. R. 350, n.; 7 Bro. Parl. C. 550. See, generally, Clark on Contracts (3d Ed.), 81.

4. See the leading case of Birkmyr v. Darnell, Salk., 27; 1 Smith's Lead. Cases, *371 and notes; Clark on Contracts (3d Ed.), 82 *et seq.*, and cases cited.

It is said that by the weight of authority a promise to indemnify is not within the statute. Clark on Contracts, 88 and cases cited. See, generally, on the subject of guaranty and suretyship, Pingrey on Suretyship & Guaranty, 2d Ed., 1913.

on my account," or "Let B have goods and charge me with them," in these cases no writing would be required, because B never would be liable at all, the goods being supplied on A's credit and responsibility, though handed by his directions to B.

The default or miscarriage of another person to which the statute applies need not be a default or miscarriage in payment of a debt or in performing a contract. [103] **Any duty imposed by the law, although not the performance of a contract, against the breach of which it was the intention of the parties to secure and be secured, must be proved by writing.** Thus where one had improperly ridden another's horse, and thereby caused its death, a promise by a third person to pay a sum of money in consideration that the owner of the horse would not sue the wrong-doer was adjudged to be unavailable, because in parol only.[5]

In Eastwood v. Kenyon[6] the Court of Queen's Bench held that **the promise, which is to be reduced into writing, is a promise made to the person to whom the original debtor is liable;** but that a promise made to the debtor himself, or even to a third person, to answer to the creditor, would not require to be reduced into writing.[7] [104] In that case, the plaintiff was liable to a Mr. Blackburne on a promissory note, and the defendant promised *the plaintiff* to discharge the note to Blackburne. The court held that this was not a promise to answer for the debt of another within the meaning of the fourth section of the statute of frauds.

After the fourth section of the statute of frauds had rendered verbal guaranties unavailable, **actions upon the case for false representations,** under circumstances in which, before the act, the transaction would have been looked on as one of guaranty, were often brought. [106] For instance, if A went to a tradesman to persuade him to supply goods to B, by assuring him that he should be paid

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5. Kirkham v. Martyr, 2 B. & A. 613.

6. 11 A. & E. 438.

7. Hargreaves v. Parsons, 13 M. & W. 561; Johnson v. Gilbert, 4 Hill, 178. "A promise to a debtor to pay his debt to a third person is not within the statute." See 7th Ed. of Smith on Contracts, *114, note and cases cited; Barker v. Bradley, 42 N. Y. (Anno. Reprint) 316 and note.

for them, the tradesman, in case of B's default, could not bring an action of assumpsit as upon a guaranty, because there was no written memorandum of what passed; but he brought an action on the case, in which he accused A of having knowingly deceived him as to B's ability to pay; and if the jury thought this case made out, he succeeded in his action, and received pretty nearly the same sum as he would have done if there had been a guaranty.[8]

However, as this was inconsistent with the object of the statute of frauds, the legislature put an end to it by enacting, in stat. 9 Geo. IV. c. 14, s. 6, commonly called Lord Tenterden's Act (which, however, is not confined to cases within the statute of frauds),[9] "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith." [107]

The third of the species of contracts enumerated by the fourth section, and required by it to be evidenced in writing is, **any agreement made in consideration of marriage.** [109]

An agreement between two persons to marry is not an agreement in consideration of marriage, within the meaning of this enactment, but these terms are confined to promises to do something in consideration of marriage, other than the performance of the contract of marriage itself.[1] [110]

Thus a promise made by the intended husband to the intended wife before marriage, to settle her personal property on her, will not be carried into effect by the Court of Chancery, unless evidenced by writing.[2]

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8. Pasley v. Freeman, 3 Term, 51; 2 Smith's L. C. (7th Am. Ed.) *157 and notes.

9. Devaux v. Steinkeller, 6 Bing. N. C. 88, per Tindal, C. J. Similar statutes have been enacted in many of the United States. See Reed on Statute of Frauds, Appendix; Smith on Contracts (7th Ed.), 117, note.

1. Clark on Contracts (3d Ed.), 89, 90 and notes; Cook v. Baker, 1 Strange, 34; Harrison v. Cage, 1 Ld. Ray. 386; Clark v. Pendleton, 20 Conn. 508; Blackburn v. Mann, 85 Ill. 222.

2. Countess of Montacule v. Maxwell, 1 Strange, 236.

The fourth class of promises, enumerated by the fourth section, is, **any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them.** [111]

These words are exceedingly large, comprehening not merely an interest *in* land itself, but any interest *concerning* it. And the main questions which have arisen have accordingly been, Whether particular contracts, falling very near the line, do or do not *concern land,* so as to fall within these terms. [112]

With respect to emblements, or *fructus industriales* (*i. e.,* the corn and other growth of the earth, which are produced, not spontaneously, but by labor and industry), **a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods.**[3] [114] And it will make no difference whether they are to be reaped or dug up by the buyer or by the seller. The true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the right to enter the land for the purpose of harvesting and carrying them away, is all that was intended to be granted to the buyer.

But the purchaser of a crop of mowing grass, unripe, which, as being the natural produce of the land, is said to be not distinguishable from the land itself in legal contemplation until actual severance, **and which the purchaser is to cut, takes an exclusive interest in the land before severance;** and therefore the sale is a sale of an interest in land within the statute.[4] [115] So it has been held that the sale of **growing underwood** to be cut by the purchaser confers an interest in land within the statute. The same has been held as to an agreement for the sale of **growing fruit.**[5] But where the owner of trees growing on his land

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3. Sainbury v. Mathews, 4 M. & W. 343; Newcomb v. Rayner, 2 John. 430, note; Penhallow v. Dwight, 7 Mass. 34; Clark on Contracts (3d Ed.), 91, 94.

4. Carrington v. Roots, 2 M. & W. 248; Clark on Contracts, 94. See note 3, *supra.*

5. Rodwell v. Phillips, 9 M. & W. 501.

(but after two had been cut down) agrees with another while the rest are standing to sell him the **timber, to be cut by the vendor,** at so much per foot, this is a contract merely for the sale of goods. The timber was to be made a chattel for the seller. And, per Littledale, J., even if the contract were for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, this would not give him an interest in the land within the meaning of the statute.[6]

Upon very similar reasoning, **when a tenant having a right to remove fixtures, left them in the house upon a parol agreement with the landlord that he should take them at a valuation,** the court were quite satisfied that this was not a sale of any interest in land.[7] [116]

But an agreement to occupy lodgings at a yearly rent, the occupation to commence at a future day, is an agreement for an interest in land within the fourth section. [117]

Where one entered into an agreement with another to relinquish, and give possession to him of a furnished house for the residue of a term which the former had therein, in consideration of a sum of money to be paid by the latter for certain repairs to be done to the house, it was considered that the contract was not merely that one side should repair and relinquish possession, and the other pay the money for the repairs, but that the relinquishment being for the remainder of a term, an assignment was contemplated, which was clearly an interest in land. [118] **The law is the same whether the interest agreed to be assigned or parted with be legal or equitable. And the same rule that the contract cannot be enforced unless in writing applies, although the consideration for the defendant's part of the contract has been performed, and nothing remains to be done but the payment of the money.**[8]

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6. Marshall v. Green, 1 C. P. D. 35; Byassee v. Reese, 4 Met. (Ky.) 372.

7. Lee v. Gaskell, 1 Q. B. D. 700. See the leading case of Elwes v. Mawe, 3 East, 38; 2 Smith's Lead. Cas. *228 and notes; Clark on Contracts, 92.

8. *Contra* in the United States. See 3 Pars. on Contracts, *35. See, generally, Clark on Contracts (3d Ed.), 91 *et seq.*

In all these cases, however, the contract, even if by mere words, is not void, but merely incapable of being enforced by action. [119] And therefore it has been held, that, if it actually has been executed, for instance, in the case of a sale of growing crops, by the vendee's reaping them and taking them away, an action will lie to recover the price as for goods sold and delivered.

A curious point has been decided upon this section with reference to a parol demise of land. Such a *demise,* if for not more than three years, is good within the statute of frauds, the first section of which enacts, that "*all leases, estates, interests of freehold,* or terms of years, or any *uncertain interest* of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in *writing,* and *signed* by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing,* shall have the force and effect of leases or estates at will only." [120] The second section excepts "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised." **But an agreement for such a lease falls, not within the first, but within the fourth section; for it is an agreement for an interest in lands; and, therefore, though a lease for a year would be perfectly good though made verbally, an agreement (so made) for such a lease cannot be enforced.**[9]

The last case provided for is that of **any agreement that is not to be performed within the space of one year from the making thereof.** [122] **The agreements meant by this section are not agreements which may or may not happen to be performed within a year, but agreements which, on the face of them, contemplate a longer delay than a year before their accomplishment.**[1]

Thus if a servant be hired for a year, and the service is

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9. Edge v. Strafford, 1 C. & I. 391.

1. See the leading case of Peter v. Compton, Skinner, 353; 1 Smith's Lead Cas. (7th Am. Ed.) *432 and notes. See, generally, Clark on Contracts (3d Ed.), 95 and cases cited.

to begin at a future time, the agreement ought to be in writing, since it will not be performed within a year. [123]

Where it appears not to have been the intent of the parties that the agreement should extend beyond a year, although it might extend far beyond that time, it need not be in writing; but where it appears to be the intent of the parties that the agreement shall not be performed within one year from the making, it must be in writing, although determinable upon a contingency, within a year.[2] [124]

Where, however, all that is to be done by one party, as the consideration for what is to be done by the other, actually is done within the year, the statute does not prevent that party suing the other for the non-performance of his part of the contract. [125] Where the one has had the full benefit of the contract, the law will not permit the other to withhold the consideration.[3]

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2. Birch v. Earl of Liverpool, 9 B. & C. 392.

3. Donellan v. Reed, 3 B. & Ad. 899; Cherry v. Heming, 4 Ex. 631. In the United States the cases on this point are conflicting. See note on page 138 of 7th Ed. of Smith on Contracts, where the cases are collected; Clark on Contracts, 99, 100. See, also, generally, Browne on the Statute of Frauds, § 272.

LECTURE IV. [128]

SALE OF GOODS, ETC., UNDER THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS.— CONSIDERATION OF CONTRACTS BY DEED AND OF SIMPLE CONTRACTS.

The seventeenth section of the statute of frauds is as follows: —

"No contract for the sale of any goods, wares, or merchandises, for the price of ten pounds[4] or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."[5]
[129]

As to the subject-matter of this section there is little difficulty in applying it. **Growing crops,** roots, etc., in the ground, are regarded as goods within the meaning of this section. **Shares in railway and other joint-stock companies** are not an interest in land within the fourth section of the statute of frauds; nor are they goods, wares, or merchandises, within the seventeenth.[6]

The first great difference between this section and the fourth section of the same act is, that the fourth section renders a writing necessary in *all cases* which fall within its terms; whereas **the seventeenth mentions three circumstances, any one of which it directs shall be as effectual as a writing,** namely, **acceptance** *of any part of the goods,* **payment** *of part of the price,* and lastly, the *giving something by way of* **earnest** to bind the bargain, or in part payment; any one of which three things will as effectually perfect the sale as a writing would.[7] Where none of these has taken

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4. Usually $50 in this country. Browne on Sales, 38.

5. This section has been re-enacted in most but not in all of the United States. Browne on Sales, 38 *et seq.*

6. Otherwise in the United States. Browne on Sales, 45 and cases cited.

7. Lee v. Gaskell, 1 Q. B. D. 700. See Browne on Sales 49, 52.

place, a writing, however, becomes necessary; and if there be none, the bargain is void, and there is no sale. [130].

This proposition, however, it seems, should be taken with some qualification since the case of Bailey v. Sweeting, 9 C. B. n. s. 843; 30 L. J. (C. P.) 150, 154; after which it seems hardly safe to say that a parol sale, unaided by any of the three formalities mentioned in the seventeenth section as equivalent to writing, is totally and entirely void. In that case, a letter from the purchaser to the seller of goods, written *after* the contract was made and the goods had been sent, was held a sufficient memorandum to satisfy the seventeenth section.[8]

A doubt was entertained at one period whether the seventeenth section included the case of a contract for something not in existence in a chattel state at the time of making the bargain, but which was to become a chattel before the time agreed upon for its delivery.[9] [131]

Where a writing is relied on to satisfy the provisions of the seventeenth section, the rules which govern the case are very analogous to those which have already been stated with regard to the fourth.[1] [132] The signature must be by the party to be *charged*, or his agent. And one party cannot be the other's agent for this purpose. Nor where the agent of the party complaining of a breach of the contract has signed with his own name a memorandum of the bargain, at the request of the party to be charged, is he to be considered as the agent of the latter in the absence of other circumstances showing authority to the signer to act

8. The better opinion seems to be that the contract is not void but merely not enforcible by action. Clark on Contracts (3d Ed.), 132 and notes.

9. The distinction, however, which once existed between executed and executory contracts has been exploded; and at present the law is believed to be that "if it [the contract] is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or a quantity of goods, it is not within the statute." In other words, "when a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to an agreement." Clark on Contracts (3d Ed.), 124 and notes.

1. Clark on Contracts (3d Ed.), 131; Browne on Sales, 55.

as the agent of the party to be charged. **But under neither the fourth nor the seventeenth section is there any necessity for the agent's being appointed by writing.**

Under the seventeenth section, too, as well as under the fourth, **several documents may be read together as making up the contract,** provided they be sufficiently connected in sense among themselves without the aid of parol evidence.[2] [133] And in such cases, as different phrases are commonly used in the different documents, it is peculiarly **important to ascertain that both parties mean the same thing;** as where there was a treaty for the sale of a horse, and one wrote that he would buy him if warranted sound and quiet in harness, and the other wrote that he would warrant him sound and quiet in *double*-harness, it was considered by the court that the parties never had contracted in writing *ad idem,* and, consequently, that the statute had not been complied with.[3]

Although it appears that there are several memoranda of the contract, it will not be presumed that they differ; but, on the contrary, if any one of them contain enough to show the contract, it is a sufficient memorandum within the statute.[4] [134]

The names of both parties must appear in the memorandum, though the signature of the party to be bound alone is requisite.[5] [135]

And the price ought to be stated if one was agreed on, for that is part of the bargain. **If no price be named,** the parties must be understood to have agreed for what the thing is reasonably worth.[6] [136]

A contract for the sale of goods of the value of £10 is within the seventeenth section, although it includes other matters for which a writing is not necessary. And if the memorandum contains all that was to be done by the party sought to be charged, it has been held sufficient to satisfy

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2. Smith v. Surman, 9 B. & C. 561.
3. Jordan v. Norton, 4 M. & W. 155.
4. Parton v. Crofts, 33 L. J. (C. P.) 189.
5. Champion v. Plummer, 1 B. & P. 252. See Browne on Sales, 59.
6. Elmore v. Kingscote, 5 B. & C. 583.

the seventeenth section, though not to make a valid agreement in cases within the fourth section. In construing these memoranda, however, the surrounding circumstances may be considered, which often make that quite plain which would be obscure without them.[7]

A memorandum is sufficient which contains all the terms of the bargain, and acknowledges it to have been made, but at the same time repudiates the contract.[8] [137]

But although the statute invalidates all contracts for the sale of goods unless in writing, or unless the buyer accept the goods, or give earnest, or pay in whole or part, and therefore virtually and in effect forbids their being in any way varied or altered by parol,[9] yet **it does not forbid their being rescinded by parol**; and there is no doubt that they may be so rescinded.[1] [138]

Points which apply to all simple contracts alike. [141]

The parties to the contract must mutually assent to the same thing. Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality, and no contract. [142]

The assent to a contract must be to the precise terms offered. [143] Where one party proposes a certain bargain, and the other agrees subject to some modification or condition, there is no mutuality of contract until there has been an assent to it so modified; otherwise it would not be obligatory on both parties, and would therefore be void.[2]

Where an offer is accepted in the terms in which it was made, the contract is binding on both parties. [145] At any time before it is accepted the offer may be rescinded, but not afterwards.

Where the offer of a contract is made by letter, the offerer

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7. Newell v. Radford, L. R. 3 C. P. 52.

8. Bailey v. Sweeting, 9 C. B. (N. S.) 843.

9. Harvey v. Grabham, 5 A. & E. (31 E. C. L. R.) 61; Marshall v. Lynn, 6 M. & W. 109; Stead v. Dawber, 10 A. & E. (37 E. C. L. R.) 57; Moore v. Campbell, 23 L. J. (Ex.) 310; Noble v. Ward, 35 L. J. (Ex.) 81; 36 L. J. (Ex.) 91, in Ex. Ch.; s. c. L. R. 1 Ex. 117; ibid. 2 Ex. 135.

1. Ibid.; see Goss v. Lord Nugent, 5 B. & Ad. (27 E. C. L. R.) 58.

2. Clark on Contracts (3d Ed.), 3; Hutchinson v. Bowker, 5 M. & W. 535.

must be considered as making during every instant of the time his letter is traveling the same identical offer to the receiver. [148] In like manner, **the receiver's acceptance of the contract is complete when in due time he sends his answer.** This due time is ascertained by the usage of trade, by the actual stipulation of the parties, or by what is a reasonable time under the circumstances. [149] **When the post is either directly or impliedly appointed by the party making the offer to be the channel of communication, the contract is complete when the letter accepting the offer is posted,**[3] at all events if the letter of acceptance reaches its destination, though after a delay caused by circumstances over which the sender has no control.

Until acceptance, the offerer may revoke his offer; but a letter countermanding the offer after the letter of acceptance has been posted will be too late.

If the letter accepting the contract is put into the post-office, but by the negligence of the post-office authorities is lost, would the contract then be complete? [150] The better opinion seems now to be that it would.[4] The acceptance of the offer, however, in order to be binding, must not be qualified by some stipulation not contained in the offer.

One of the main distinctions between a contract by deed and a simple contract is, that the latter requires a consideration to support it, the former not. When it is said that a contract by deed does not require a consideration to support it, it is meant that it **does not require a consideration for the purpose of binding the party who executes it,** and rendering him liable. It is not to be understood that a consideration may not come to be a most important ingredient in a contract by deed, as between parties claiming a benefit under that deed and other parties having conflicting claims upon the person executing it. For instance, **the statute of 13 Eliz., c. 5,** renders a great variety of deeds (if made with-

3. Clark on Contracts (3d Ed.), 31.

4. Household Insurance Co. v. Grant, 4 Ex. Div. 216; Clark on Contracts (3d Ed.), 31 *et seq.* and notes; Vassar v. Camp, 11 N. Y. (Anno. Reprint) 441 and note.

out a valuable consideration) void as against creditors.[5] [151]

With regard to the question, **What does the law of England recognize as a consideration capable of supporting a simple contract?** [155] the best and most practical answer is, **Any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon, the person to whom it is made.**[6]

This consideration must proceed from the party to whom the promise is made. [160] If it proceed from some third person, not in any way moved or affected thereto by the promisee, the latter is a stranger to the consideration, and a promise made to him is *nudum pactum*.

Provided there be some benefit to the contractor, or some loss, trouble, inconvenience, or charge imposed upon the contractee, so as to constitute a consideration, the courts are not willing to enter into the question whether that consideration be adequate in value to the thing which is promised in exchange for it.[7] [162] **Very gross inadequacy, indeed, would be an index of fraud,** and might afford evidence of the existence of fraud; and fraud is a ground on which the performance of any contract may be resisted. But in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract.[8] [163]

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5. See Twyne's Case, 3 Coke, 80; 1 Smith's Lead. Cases, *33 and notes.

6. See Clark on Contracts, 133; Holmes, Com. Law, sec. vii; Langdell, Summary of Law of Contracts, §§ 62, 63.

7. Clark on Contracts (3d Ed.), 140.

8. Id.

"There is an old case upon this subject, involving so singular a state of facts that I cannot forbear mentioning it. It is called Thornborow v. Whiteacre, and is reported 2 Ld. Raym. 1164. It was an action in which the plaintiff declared that the defendant, in consideration of 2*s*. 6*d*. paid down, and £4 17*s*. 6*d*. to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on Monday, the 29th of March, four on the next Monday, eight on the next, sixteen on the next, thirty-two on the next, sixty-four on the next, one hundred and twenty-eight on the next, and so on for a year, doubling on every successive Monday the quantity delivered on the last Monday.

The defendant demurred to the declaration; and upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered

The consideration must, nevertheless, be of some value in contemplation of the law; for instance, if a man make an estate at will in favor of another, this is an insufficient consideration, for he may immediately determine his will.[9] [165]

There is one class of cases which form a species of **exception to the rule that a simple contract requires a consideration to support it,** [166] viz., the case of **a negotiable security,** as a bill of exchange or promissory note. These, not being under seal, are simple contracts; but **they are always presumed to have been given for a good and sufficient consideration, until the contrary is shown.** [167] And even if the contrary *be* shown, still, **if the holder for the time being have given value for the instrument, his right to sue on it cannot be taken away** by showing that the person to whom it was originally given could not have sued, unless, indeed, it be further shown that he (the holder) had **notice** of the circumstances, or that he took the security when overdue, which is a sort of constructive notice, and

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would be 524,288,000 quarters; so that, as Salkeld the reporter, who argued the demurrer, remarked, all the rye grown in the world would not come to so much. But the court said, that though the contract was a foolish one, it would hold at law, and that the defendant ought to pay something for his folly. The case was ultimately compromised. I presume, however, that if, instead of demurring, the defendant had pleaded that he had been induced to enter into the contract by fraud, he would have been able to sustain his plea; since it seems obvious, on the face of the thing, that the plaintiff was a good arithmetician, who, by a sort of catch, took in a man unable to reckon so well. Probably, the plaintiff had taken his hint from the old story regarding the invention of the game of chess. But, by demurring, the defendant admitted that there was no fraud, and, consequently, the only question was on the validity of the contract in the absence of fraud; so that the case presents a strong example of the reluctance of the courts to enter into a question as to the adequacy of consideration."

"So in the old case in which the horse was sold for one barley-corn for the first nail in the horse's shoe, two for the second, and so on, doubling on each nail, the jury found, under the direction of the court, for 8*l.*, the value of the horse. James v. Morgan, 1 Lev. 111." Smith on Contracts (7th Ed.), *179 and note.

9. 1 Rolle Abr. 23, pl. 29; White v. Bluett, 23 L. J. (Ex.) 36; Pfeiffer v. Adler, 37 N. Y. 164; note 21 N. Y. (Anno. Reprint, Book 5) bottom pp. 148, 149.

places him in the same situation as the party from whom he took it. But so long as nothing of that sort appears, every note and acceptance is *prima facie* taken to have been given for good consideration, and every indorsement to have been made on good consideration.[1]

1. Clark on Contracts (3d Ed.), 138, 139.

LECTURE V. [168]

CONSIDERATION OF SIMPLE CONTRACTS.— EXECUTED CONSIDERATIONS.— WHERE EXPRESS REQUESTS AND PROMISES ARE OF AVAIL.— MORAL CONSIDERATIONS.— ILLEGAL CONTRACTS.— RESTRAINTS OF TRADE.

If one man have a legal or equitable right of suit against another, his **forbearance to enforce that legal or equitable right of suit is a sufficient consideration for a promise** either by the person liable to him or by any third person, either to satisfy the claim on which that right of suit is founded, or to do some other and collateral act.[2] [169]

And where a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain future time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that time, and if so, that is a good consideration for the giving of the note.[3] [171]

Although a man has not a clear legal or equitable right, yet if his right or claim is doubtful, and not clearly nugatory or illegal, the abandonment, or, for the same reason, the forbearance of an action brought to enforce it, is a sufficient consideration for a promise. Indeed, the disputed claim may be wholly unfounded, and yet the compromise of, or forbearance to enforce the claim, may be a good consideration, if the claim be made *bona fide* at the time of the agreement to compromise or forbear.[4]

A fortiori, where the right is not doubtful, but the amount of the claim only is disputed, an agreement for the settlement of all disputes upon the payment of a definite but smaller sum than that claimed, is held to be founded upon sufficient consideration. [172] But it would be another matter if a person made a claim which he knew to be unfounded.[5]

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2. Clark on Contracts (3d Ed.), 150.

3. Belshaw v. Bush, 29 L. J. (C. P.) 24.

4. Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Clark on Contracts (3d Ed.), 150, 155.

5. See note 4, *supra*.

Again, if I intrust a man to do some act for me, although I am to pay him nothing for performing it, still the mere trust which I repose in him is a consideration for a promise on his part to conduct himself faithfully in the performance of it. [174] Nay, it is settled that not only is the reposal of such trust a sufficient consideration for an express promise on the part of the person in whom it is reposed to conduct himself faithfully in the performance of it, but **the law, even in the absence of an express promise, implies one that he will not be guilty of gross negligence.** This was the point decided in the famous case of **Coggs v. Bernard.**[6] In this case Bernard had undertaken safely and securely to take up several hogsheads of brandy from one cellar, and safely and securely to lay them down again in another; and he was held bound by that undertaking, and responsible for damage sustained by them in the removal. If goods are deposited with a friend, and are stolen from him, no action will lie. [175] But there will be a difference in that case upon the evidence how the matter appears. If they are stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. But if a man takes upon him expressly to do such an act safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him.

On this point it is that the celebrated **distinction occurs between remunerated and unremunerated agents; from the former of whom the law implies a promise that they will act with reasonable diligence; from the latter, only that they will not be guilty of gross negligence.**[7]

There is another equally remarkable distinction, namely, that **a remunerated agent may be compelled to enter upon the performance of his trust, or at least made liable in damages if he neglect to do so; whereas an unremunerated agent cannot,** although, as we have seen, he *may* be liable for misconduct in the performance of it.[8] [176]

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6. 2 Ld. Raym. 909; 1 Smith's L. C. (7th Am. Ed.) *283.

7. Beauchamp v. Powley, 1 M. & Rob. 38; Dartnall v. Howard, 4 B. & C. 345.

8. Elsee v. Gatward, 5 T. R. 143.

Again, if one man is compelled to do that which another man ought to have done and was compelled to do, that is a sufficient consideration to support a promise by the former to indemnify him. [177] Such is the common case of a surety who has been compelled to pay a demand made against the principal, and who is entitled to bring an action of assumpsit to recover an indemnity.[9]

An executed consideration is one which has already taken place, an executory consideration one which is to take place, — one is *past,* the other *future.* [178] Whenever, at the time of making a promise, the consideration on which it is founded is *past,* the consideration is said to be *executed;* whenever the consideration is future, it is said to be *executory.*[1] [179]

An executed consideration must be founded on a previous request; an executory one need not; or, to speak more correctly, its very terms imply a request.[2] For if A promise to remunerate B, in consideration that B will perform something specified, that amounts to a request to B to perform the act for which he is to be remunerated.

Although an *executed consideration* must have arisen from a previous request by the person promising, in order that it may be sufficient to support the *promise,* **there are certain classes of cases in which this previous request is implied,** and need not be expressly proved by the person to whom the promise is given. [182]

First, **the case already stated, in which one man is compelled to do that which another ought to have done, and was compellable to do.** In this case the consideration is an *executed* one, for the thing must have been *done* before any promise can be made to reimburse the person who has done it; but though the consideration is *executed, the law implies the request.* And therefore in this case an action may be brought for indemnity, without proving any express request on the part of the defendant.[3]

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9. Pownall v. Ferrand, 6 B. & C. 439; Holmes v. Williamson, 6 M. & S. 158.

1. Clark on Contracts (3d Ed.), 169.

2. Hunt v. Bate, Dyer, 272; Dearborn v. Bowman, 3 Met. 155.

3. Batard v. Hawes, 22 L. J. (Q. B.) 443; Clark on Contracts (3d Ed.), 169.

In this class of cases, and also in the next, not only is the request implied, but the promise also. [183] For if, to put an example, A is indebted to B in a certain sum of money, and C is his surety; if C be compelled to pay, not only is a request by A to do so implied by law, but a promise by him to indemnify C is also implied. And in an action brought by C to enforce the indemnity, he need prove no express promise, no express request, but simply that A was indebted to B, and that he, C, as A's surety, was compelled to pay that debt. [184]

Secondly, **where the person who is songht to be charged adopts and takes advantage of the benefit of the consideration.** Suppose, for instance, A purchases goods for B without his sanction, B may, if he think fit, repudiate the whole transaction; but if, instead of doing so, he receive the goods and take possession of them, the law will imply a request from him to A to purchase them, and will also imply a promise by him to repay A, and he will be liable in an action of *assumpsit* for money paid to his use, founded on that implied promise.[4] The cases where goods have been supplied to children without the knowledge or express request of the father are illustrations of this rule. Even where the goods supplied are necessaries, some recognition amounting to adoption is requisite, in order to render the father liable, and to support the implied request and promise; in such case it has often been considered sufficient that the father should have seen them worn by the child without objection. [185]

With respect to service rendered without request, if, at the time, the defendant had no power to accept or refuse it, acceptance of the service is no evidence of a promise to pay for it.

The third case in which a request is implied, is that **in which a person does, without compulsion, that which the person sought to be charged was compellable by law to do.** [186] Suppose, for instance, A owes B £50, and C pays it: now here, if A promise to repay C, it will be implied that

4. Coles v. Bulman, 6 C. B. 184; Derby v. Wilson, 14 John. 378.

the payment by C was made at his request.[5] But in this class of cases, though the request is implied where there is a promise, yet **the promise must be express,** for the law will not imply one, as in the last two cases;[6] thus if A is B's surety, and is forced to pay his debt, the law implies a request to repay. If he be not B's surety, but pays it of his own accord, the law implies neither promise nor request, for **a man cannot make me his debtor by paying money for me against my will.**[7] Yet even in this case, if B *expressly* promise to repay it, a request by him to pay it is implied.[8]

There is a fourth class of cases, **in which the consideration relied on has been that one man has done for another something which that other, though not legally, is morally bound to do.** [187] In such cases it may be considered as now settled, that **a merely moral consideration will not support a promise.** And the Court of Queen's Bench, in the case of Eastwood v. Kenyon,[9] quotes with approval the conclusion arrived at in the note to Wennall v. Adney,[1] "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, *had it not been suspended by some positive rule of law;* but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."[2] [188]

The remaining part of a contract is the promise, as to which the law in general leaves to the will of the parties this part of their mutual arrangement. [189] **The law, however, will no more enforce an illegal promise than an illegal consideration;** but in cases of **executed contracts** there is a rule of law which is well worthy of attention. It is, that **where the law implies a certain promise from a consideration executed, that consideration will not support any**

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5. Wing v. Mill, 1 B. & Ald. 104.
6. Atkins v. Banwell, 2 East, 505.
7. Durnford v. Messiter, 5 M. & S. 445.
8. See Kenan v. Holloway, 16 Ala. 53.
9. 11 A. & E. 447.
1. 3 B & P. 247.
2. See, also, Flight v. Reed, 1 H. & C. 703; Snevily v. Read, 9 Watts. 396; Mills v. Wyman, 3 Pick. 207. See, generally, as to consideration, Clark on Contracts (3d Ed.), ch. 5, pp. 133-176 and notes.

other promise than the one which the law implies. [190] That promise exhausts the consideration, and there is nothing left to support any other promise. Such promise, consequently, however expressly made, is *nudum pactum.*

The next subject of inquiry is **the effect of illegality upon the contract.** [192]

Every contract, be it by deed or be it without deed, is void if it stipulate for the performance of an illegal act, or if it be founded upon an illegal consideration.[3]

If the consideration be legal, a promise to do several acts, some illegal and some legal, renders the contract void as to the illegal acts; but if any part of the consideration be illegal, the whole contract fails.[4] [193]

Illegality is of two sorts: it exists at *common law,* or is created *by some statute.*

A contract illegal at common law is so either because it violates morality, or because it is opposed to the policy of the law, or because it is tainted with fraud.

On the first ground, namely, **because the contract violates the principles of morality,** the printer of an immoral and libellous work cannot maintain an action for the price of his labor against the publisher who employed him.[5]

The greater number of examples of the application of this rule afforded by the books is, where **illicit cohabitation or seduction** has been brought forward as the consideration of the contract. [195] These, if intended to be future,[6] are illegal considerations; if already past, they are no consideration at all.[7]

Next, with regard to the second class, namely, those which are void as contravening the policy of the law. [196]

Contracts in general restraint of trade are totally void. The law will not allow or permit any one [unreasonably]

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3. Clark on Contracts (3d Ed.), 168, 314 and cases cited in notes; Collins v. Blantern, 2 Wilson, 341; 1 Smith's Lead. Cas. *489 and notes.

4. Collins v. Merrill, 2 Met. (Ky.) 163; Gelpcke v. Dubuque, 1 Wall. 221.

5. Poplett v. Stockdale, R. & M., 337; 2 C. & P. 198.

6. Walker v. Perkins, 3 Burr. 1568; Travinger v. McBirney, 5 Cow. 253.

7. Beaumont v. Reeve, 8 Q. B. 483.

A sealed instrument, however, in consideration of past seduction or cohabitation, will be enforced. Wye v. Mosely, 6 B. & C. 133; Clark on Contracts (3d Ed.), 376.

to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in *the kingdom,* would be void.[8] [197]

But here arises **a distinction,** which was first illustrated by Lord Macclesfield, in the celebrated case of **Mitchell v. Reynolds,**[9] which has ever since been upheld. It is, that **though a contract in general restraint of trade is void, one in partial restraint of trade may be upheld; provided the restraint be reasonable, and provided the contract be founded upon a consideration.** Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported: such is the case of the disposing of a shop in a particular place, with a contract on the part of the *vendor* not to carry on a trade in the same place.[1]

But it must always be borne in mind " that **contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law.**[2] [199]

Examples of what are considered partial restraints of trade are numerous in the books. They are usually partial in respect of time, as not to exercise it for a specified period; or in respect of space, as not to trade within a given district; and a restraint limited as to space may be unlimited as to time and yet be good. But **these restraints must,** in order to be upheld, **be reasonable;** that is, **a greater restriction must not be wantonly imposed than can be necessary for the protection intended.**[3] [201]

Where one covenants with another not to carry on busi-

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8. See, generally, Clark on Contracts (3d Ed.), 384 and cases cited. See, however, Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345; s. c. 39 L. J. (Ch.) 86.

9. 1 P. Wms. 181; 1 Smith's L. C. (7th Am. Ed.) *508.

1. Clark on Contracts (3d Ed.), 384.

2. Horner v. Graves, 7 Bing. 744; Warner v. Jones, 51 Me. 146; Dean v. Emerson, 102 Mass. 480. See, however Tallis v. Tallis, 22 L. J. (Q. B.) 185; s. c. 1 E. & B. 391.

3. Clark on Contracts (3d Ed.), 384 and cases cited; Mitchell v. Reynolds, 1 P. Wms. 181; 1 Smith's Lead. Cas. (8th Ed.), 417 and notes.

ness within a given distance of that other's house, this distance is to be calculated, popularly speaking, "**as the crow flies,**" more accurately, by drawing a circle on a map, the radius of which is the given distance measured on the map.[4] [207] And where the question is whether the covenant is broken by the too great proximity of one house to another, then, in measuring the distance, it should be taken from the nearest point of the one house to the nearest point of the other, without regard to where the doors are situated.

Further, **contracts in restraint of trade must, in order to be good, be founded on a consideration,** even although they be made by deed.[5] **But the question of the adequacy or inadequacy of the consideration cannot be entertained;** the parties must judge of that for themselves. [209]

Another example of contracts, illegal because in contravention of the policy of the law, is afforded by those cases in which **contracts in general restraint of marriage** have been held void.[6] [210]

On the subject of marriage, it may be mentioned that **a deed tending to the future separation of husband and wife is void** on grounds of public policy;[7] although a deed providing a fund for the lady's support on the occasion of an *immediate* separation is not so.[8] [211] And even where the parties, after executing a lawful deed of separation, have been reconciled and have cohabited, the deed is not necessarily annulled thereby; but a court of equity will compel performance of covenants therein, if it appear that such reconciliation was not intended to annul them.[9]

Almost the converse of these cases of deeds of separation are what are called **marriage brocage contracts;** that is, where a man has agreed, in consideration of money, to bring about a marriage. [212] These are all void, as against public policy.[1]

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4. Mouflet v. Cole, L. R. 8 Ex. 32.
5. Young v. Timmins, 1 C. & J. 339.
6. Robinson v. Omaney, 21 Ch. Div. 780; 23 ib. 285; Clark on Contracts (3d Ed.), 380.
7. Hindley v. Marquis of Westmeath, 6 B. & C. 200.
8. See v. Thurlow, 2 B. & C. 547.
9. Webster v. Webster, 22 L. J. (Ch.) 837.
1. Hall v. Potter, 3 Lev. 411; Clark on Contracts (3d Ed.), 381.

LECTURE VI. [213]

ILLEGAL CONTRACTS.— FRAUD.— GAMING AND HORSE-RACING.— WAGERS.

Another class of contracts illegal at the common law consists of those **void, because having a tendency to obstruct the administration of justice.**[2]

There are, however, some instances in which indictments for misdemeanors may be compromised. [215] A party committing certain private injuries may be indicted, as for a misdemeanor, as well as sued in a civil action. In many such cases it can hardly be admitted that the prosecution is to be considered public, or that the public interest is concerned in bringing such an offender to justice by way of example to others. Substantially, the only one who suffers by the wrong is the individual against whom it is committed. In instances of this kind, the law does not forbid a compromise between the injurer and the injured. "The law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. [216] It is often the only manner in which he can obtain redress. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it."[3] The law will therefore sanction a bond, conditioned to remove a **public nuisance**, founded on the abandonment of an indictment for that nuisance, which is in fact a very common instance of compromise.[4] The compromise of indictments for **assaults** is another frequent instance of the same rule.[5] But if the offence is not confined to personal injury, but is accompanied with riot and the obstruction of a public officer in

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2. See the leading case of Collins v. Blantern, 2 Wils. 341; 1 Smith's L. C. (7th Am. Ed.) *489 and notes See, also, generally, chapter 4 of Huffcutt & Woodruff's Cases on Contracts (3d Ed., 1913), pp. 361-457, a collection of useful cases.

3. Keir v. Leeman, 6 Q. B. 321.

4. Fallowes v. Taylor, 7 T. R. 475.

5. Baker v. Townsend, 7 Taunt. 422.

the execution of his duty, these are matters of public concern, and therefore not legally the subject of a compromise.[6]

Agreements to indemnify persons against the consequences of [future][7] illegal acts fall within the rule as contracts directly to obstruct the administration of justice.[8] [218] So also do all promises which are made to obtain release from **duress** of person by illegal arrest, or under compulsion of colorable legal process, whereby it is made the instrument of oppression or extortion; but not where the arrest was legal;[9] and for similar reasons money extorted by duress of the plaintiff's goods, and paid by him under protest, may be recovered back.[1]

Maintenance consists in one who has no interest in the subject of a suit, and no just right to interfere in it, aiding by money or otherwise the parties interested. This is forbidden by the law, whose policy has always been to discourage disputes and litigation. A contract, therefore, with such an object is void; but a man who has an interest in the cause, or reasonably thinks he has, is not guilty of maintenance if he prosecutes it in common with others, and his agreement so to do is good.[2] [219]

If a person, having no interest in a suit, interferes with the object of sharing in the fruits of the suit, this is champerty. If, therefore, an attorney agrees not to charge his client costs, in consideration of having for himself a proportion of what he may recover for him, this agreement is champerty, and consequently illegal and void.[3]

It is mainly for the purpose of avoiding maintenance that the rule of our law forbidding the assignment of choses in

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6. Keir v. Leeman, *supra*.

7. Hackett v. Tilly, 11 Mon. 93; Given v. Diggs, 1 Cai. 450.

8. Shackell v. Rosier, 2 Bing. N. C. 634; Mitchell v. Vance, 5 Mon. 529.

9. See Cummings v. Hooper, 11 Q. B. 112.

1. Ashmole v. Wainwright, 2 Q. B. 837; Stebbins v. Miles, 25 Miss. 267.

2. Findon v. Parker, 11 M. & W. 675.

3. Re Masters, 4 D. P. C. 18. In the United States the cases on this subject are in conflict. See note to 7th Am. Ed. of Smith on Contracts, 237; Weeks on Attorneys, §§ 350 *et seq*. The better opinion, however, is that such contracts are void. Ackert v. Barker, 131 Mass. 436; Clark on Contracts (3d Ed.), 370-376 and cases cited.

action has been established, a rule which, as the law admits the assignee to sue in the name of the assignor, seldom interferes with the liberty required by trade and commerce. [220]

All contracts between British subjects and alien enemies, not having a license to trade with this country, are void, and cannot be enforced, even upon the return of peace. But if the contract has been made before the war between their respective countries began, the parties thereto may sue upon it when peace is restored.[4] [221]

Agreements contravening the ends and objects of the enactments of the legislature, or, as it is most commonly expressed, the policy of those enactments, **are void.**[5]

This class of illegality is properly arranged with other instances of illegality by the common law, because it does not consist in the breach of any enactment of a statute, but violates the principle of the common law, which is to carry into effect the intent and object of the legislature. [222]

The terms policy of the law and public policy are used indiscriminately in many of the cases, although perhaps the phrase "policy of the law" indicates more correctly the sense in which the terms are used in law, than the words "public policy." [223] Whichever form is employed, **two distinct classes of things are referred to by them.** Sometimes they indicate **the spirit of a law as distinguished from the letter of it.** In this sense the words are also used, when, in construing a particular law, the judges look at the object and policy with which it was framed, and the evil which it was apparently intended to remove. [224] They use the policy of a particular law as a key to open its construction.

At other times these expressions indicate **a principle of law, which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.** If this be understood as the public good, recognized and protected by the most general maxims of

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4. Kensington v. Inglis, 8 East, 273; Clark on Contracts (3d Ed.), 182; Bank of New Orleans v. Matthews, 49 N. Y. (Anno. Reprint) 12 and note.

5. Ritchie v. Smith, 6 C. B. 462.

the law and of the constitution, it furnishes a rule much more general than the first class, yet definite in its terms, and clearly distinguishable from that class of public policy or political expediency which would comprise such questions, as, whether it is wise to have a sinking fund or a paper circulation, and which would properly guide the legislature or the executive government in determining any question which they might have to deal with. It is evident that courts of law cannot decide upon these considerations.

It would seem that **all the cases which have been decided upon the ground of public policy are referable to one or other of the two classes above mentioned,** and perhaps this section of law cannot be summed up in a way more satisfactory to the reader than by quoting the words of Parker, C. J., in the famous case of **Mitchell v. Reynolds:**[6] "All the instances of a condition against law in a proper sense are reducible under one of these heads: first, either to do something that is *malum in se* or *malum prohibitum;* secondly, to omit the doing of something that is a duty; thirdly, to encourage such crimes and omissions. [225] Such conditions as these the law will always, and without regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes."[7]

The third class of cases consists of those in which the contract is avoided on the ground of **fraud;** that is, deceit practised upon the contracting party in order to induce him to enter into it. [226] The deceit may be of an active kind, as falsehood and misrepresentation actually used by one party for the purpose of deceiving the other; **or it may be passive,** as where a vendor knows that a purchaser labors under a delusion, which he also knows is influencing his judgment in favor of purchasing, and [being under a duty or obligation to communicate the facts] suffers him to complete his purchase under that delusion.

If the representation be not known to be false by the utterer of it, or be not used with intent to deceive, it will

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6. 1 P. Wms. 189; 1 Smith's L. C. (7th Am. Ed.) *508.

7. See, generally, Clark on Contracts (3d Ed.), 348-404, where the subject is fully considered and the cases cited.

not amount to fraud, although really false. [227] **Moral fraud in a representation is essential in order to invalidate a contract** made upon the faith of that representation. But it is not necessary, in order to constitute *moral fraud,* that it should be false to the knowledge of the party making it: if untrue in fact, and *not believed to be true* by the party making it, and made for a fraudulent purpose, it is both a legal and a moral fraud. **This deceit, moreover, must also actually induce the contracting party to enter into the contract.** If he contracted, not believing it, or trusting to his own judgment, and not to the representation, he cannot avoid this contract on account of the falsehood.[8] [228]

With regard to the class of **contracts void because illegal under the express provisions of some statute,** no contract prohibited by the *express* provisions of a statute can be enforced in any court of law. **An implied prohibition is equally fatal** to its validity.[9] The examples which most commonly occur in practice of implied prohibition are in cases in which an act does not *in express terms* enact that a particular thing shall not be done, but imposes a **penalty** upon the person doing it. [229] In such cases the imposition of the penalty is invariably held to amount to an implied prohibition of the thing itself, on the doing of which the penalty is to accrue. The sole question in every case is whether the statute means to prohibit the contract. [233]

There is **a practical distinction** between contracts forbidden by the *express* or *implied* enactment of some statute, and another class, in which the *contract* itself does not violate the statute, but some **incidental illegality** occurs in carrying it into effect. [234] In these latter cases the contract is good, and may be made the subject-matter of an action, notwithstanding the breach of the law which has occurred in carrying it into effect[1]

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8. Moens v. Heyworth, 10 M. & W. 147; Atwood v. Small, 6 Cl. & Fin. 232; note Smith on Contracts (7th Am. Ed.), *248; Clark on Contracts (3d Ed.), 272-297 and cases cited.

9. Wetherell v. Jones, 3 B. & Ad. 221. See, generally, Clark on Contracts (3d Ed.), 320 *et seq.* and cases cited.

1. See the note on page 259, 7th Am. Ed. of Smith on Contracts and cases cited; also next note, *supra.*

Where a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. [236] But in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law.

The distinction concerning an indidental illegality applies to cases of common law as well as statutable illegality. [237]

At common law, contracts by way of gaming or wagering were not, as such, unlawful.[2] [245] Their illegality depends upon statute law. If a party loses a wager [made illegal by statute], and requests another to pay it for him, the loser is liable to the party so paying it for money paid at his request. [246] But it has been held also, that the amount of a bet lost at a horse-race, and paid by the loser into the hands of a third party, on the promise of the latter to pay it to the winner, cannot be recovered by the winner out of the assets of such third person, if deceased. [247]

There is one class of *wagers* which require some attention, viz., wagers in the shape of **policies of insurance.** [248] An insurance is a contract by which, in consideration of a premium, one or more persons assure another person or persons in a certain amount against the happening of a particular event; for instance, the death of an individual, the loss of a ship, or the destruction of property by fire. **These three classes of policies, upon ships, lives, and fire, are of the most common occurrence;** but there is nothing to prevent insurance against other events.[3]

What is to be considered as an interest in the event within the meaning of the statutes upon this subject? [251] It is clear that a **creditor** has an interest in the life of his

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2. Hampden v. Walsh, 1 Q. B. D. 189; Campbell v. Richardson, 10 John. 406; Clark on Contracts (3d Ed.), 341, 342.

In some states, however, all wagers on matters in which the parties have no interest are illegal, as being contrary to public policy. Clark on Contracts, 342 and notes.

3. *Wager policies*, or policies wherein the insured has no interest in the life or thing insured, are by the weight of authority *invalid*. Clark on Contracts (3d Ed.), 343.

debtor, that a trustee may insure for the benefit of his *cestui que trust*, that a wife has an interest in her husband's life, and that a man may assure his own life; but he cannot evade the statute by doing so with the money of another, which other is to derive the benefit of the assurance, and has no interest in his life.[4]

4. Clark on Contracts, 344.

LECTURE VII. [253]

THE LORD'S DAY ACT.— BILLS OF EXCHANGE FOR ILLEGAL CONSIDERATION.— RECOVERY OF MONEY PAID ON ILLEGAL CONTRACTS.

Contracts falling within the operation of the Lord's Day Act, 29 Car. II., c. 7. This statute enacts that no tradesman, artificer, workman, laborer, or other person whatever shall do or exercise any worldly labor, or business or work of their ordinary callings, upon the Lord's day (works of necessity or charity only excepted), and that every person of the age of fourteen years offending in the premises shall forfeit five shillings.[5] [254] The contracts prohibited by this statute are, not every contract made on Sunday, but contracts made in the exercise of a man's *trade or ordinary calling:* thus it has been decided that a contract made on Sunday by a farmer for the hire of a laborer is valid. The court decided, first, that a farmer was not a person within the meaning of the statute at all, for that the meaning of the words "tradesman, artificer, workman, laborer, *or other person whatsoever,*" was to prohibit the classes of persons named and other persons *ejusdem generis,* of a like denomination; and they did not consider a farmer to be so. And, secondly, they held that even if the farmer were comprehended within the class of persons prohibited, the hiring of the servant could not be considered as *work done* in his *ordinary calling.*

The former of the two points decided in this case furnishes a very good exemplification of the celebrated **rule of construction as applied to statutes,** namely, that **where an act mentions particular classes of persons, and then uses general words, such as "all others," the general words are**

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5. Statutes upon this subject containing provisions more or less strict than those of the statute of Charles have been re-enacted in most, if not all, of the United States. The student is referred to the statutes and decisions of the several states upon the subject. See, also, Clark on Contracts (3d Ed.), 328-332.

restrained to persons of the like description with those specified.[6] [255]

The general rule of the [common] law of England is, that a contract is not assignable; that is, that a man who has entered into a contract cannot transfer the benefit of that contract to another person, so as to put that other person in his own place, and entitle him to maintain an action upon it in case of its non-performance.[7] [269]

There are **some contracts** which, by the operation either of a statute or of some peculiar rule of commercial law, **are exempted from the operation of the above rule,** and rendered transferable in the same way as any other property from man to man. Such are **bills of exchange,** which, by the law merchant, are **transferable by indorsement, if payable to order; by delivery, if payable to bearer.** [270] Such, too, are **promissory notes,** which, by the statute 3 & 4 Anne, c. 9, are placed on the same footing as bills of exchange.[8] **Where some one of these instruments had been made upon an illegal consideration:** where, for instance, a bill of exchange was accepted for an illegal gambling debt, **no action could be maintained between the original parties to it. But where the instrument has gone out of the hands of the person to whom it was originally given,** and has got into the hands of some third person, the law [when not altered by statute] stands thus: **Whenever illegality depended on the common law, or on an act of parliament which did not in express terms render the security void, there the courts applied the rule which reason and justice dictate, and held that the person who had given value for the security, and had taken it without notice that it was affected by an illegality, was entitled to recover upon it.**[9] [271]

As to the case of an illegal contract which has been in part performed, *e. g.*, where money has been paid in pursuance of it, although the common rule is that **where money**

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6. See Sandiman v. Breach, 7 B. & C. 96; Queen v. Nevill, 8 Q. B. 452.

7. Altered by the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 25, subsec. 6.

8. See Negotiable Instruments, *post*, in this volume.

9. See Negotiable Instruments, *post*.

has been paid upon a consideration which totally fails, an action will lie to recover it back again, it is otherwise where the contract was an illegal one. [273] Where money is paid in pursuance of an illegal contract, the consideration of course fails, for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still no action will lie to recover it back again, for the reason that the law will not assist a party to an illegal contracct.[1]

To this rule, however, there are **two exceptions**: The first is, **where the illegality is created by some statute, the object of which is to protect one class of men against another,** or where the illegal contract has been extorted from one party by the oppression of the other. [274] In cases of this sort, although the contract is illegal, and although a person belonging to the class *against* whom it is intended to protect others cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the act more efficacious.[2] [275]

The other exception is, that, **when money has been paid in pursuance of an illegal contract, not to the other contracting party, but to a stakeholder, then either party may recover it back again**; for instance, if parties agreed to play at an illegal game, and each deposited his stake in A's hands, either might recover it back from A. [279] Thus it has been held, that if a wager be deposited with a stakeholder, to be paid over on the event of a battle to be fought by the parties laying the wager, and it be demanded from him *before it has been paid over,* the party demanding may recover it from the stakeholder, although the battle has been fought, but it did not appear which party had succeeded.[3]

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1. M'Kinnell v. Robinson, 3 M. & W. 441; Howson v. Hancock, 8 T. R. 575; Browning v. Morris, Cowp., 790; and Lubbock v. Potts, 7 East, 449.

2. Smith v. Bromley, 2 Doug. 696, note; Smith v. Cuffe, 6 M. & Selw. 160.

3. See Cotton v. Thurland, 5 T. R. 405. See, also, Taylor v. Bowers, 1 Q. B. D. 291; Clark on Contracts (3d Ed.), 426.

LECTURE VIII. [281]

PARTIES TO CONTRACTS.— WHO ARE INCOMPETENT TO CONTRACT.— INFANTS— WIVES.

The next branch of the subject relates to the **parties to the contract.**

Prima facie any subject of the realm has power to enter into any contract not rendered illegal by the provisions of the statute or common law; and, therefore, the cases to be now considered are cases of complete or partial *disability*. [282]

The first disability to be considered is that of *Infancy*.

The general principle is, that **an infant may bind himself by a contract for what the law considers necessaries**, but not by any other contract.[4] [283]

Under the denomination "necessaries" fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree, and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves. The question what is conformable — what is, in the legal sense of the word, necessary — is in each case to be decided by a jury; but these are the principles by which the judge ought to direct the jury that their decision should in each particular case be guided. Though, however, the question of "necessaries" or not "necessaries" is one of fact, and therefore for the jury, yet, like all other questions of fact, it should not be left to the jury by the judge unless there is evidence on which they can reasonably find in the affirmative. [284] If there is not, the judge ought to withdraw the question from the jury.[5]

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4. See a full consideration of the cases in which an infant may bind himself, in 13 Am. Law Rev. 280, and in Ewell's Lead. Cases (1st Ed.), 22 *et seq.*, 56 *et seq.*

5. The infant is bound by his implied but not his express contract for necessaries. Clark on Contracts (3d Ed.), 192, 193; Ewell's Lead. Cases (1st Ed.), 55-74 and notes.

Necessaries for an infant's wife and children are necessaries for himself.[6] [289]

An infant cannot bind himself by any **contract having relation to trade.** [293]

Again, he cannot bind himself by **stating an account,** although the items of the account be all recoverable against him as for necessaries. [295] [Nor is he bound by his **cognovit.**]

An infant is not bound by an agreement to refer a dispute to **arbitration,** nor can he render himself liable by **borrowing,** even to lay out upon necessaries the money borrowed.

Suppose an infant does in fact enter into a contract for something not falling under the denomination of necessaries, what will be the consequence? [298] In the first place, **no action can be maintained against him during his infancy upon any such contract, nor afterwards, unless he elects to confirm it;** not even although by fraudulently representing himself to be of age, he induced the plaintiff to contract with him. But, in the second place, **the contract is not absolutely void, but voidable;** and, therefore, when he arrives at the age of twenty-one, **he may confirm it,** and, if he do so, he will become liable to an action upon it.[7]

If, after full age, the party repudiates a contract made during his infancy, he must do so within a reasonable time after he comes of age.[8] [302]

As to the effect of an infant's contracts on the other contracting party, the rule is, that **the adult is bound though the infant is not.**[9] [303]

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6. See the subject of necessaries fully considered in Clark on Contracts (3d Ed.), 192, and Ewell's Lead. Cases (1st Ed.), 55-75.

7. The clear tendency of modern authority seems to be that *all the acts and contracts of infants, executed or executory, except a few held to be binding upon him, and a few held to be absolutely void* (both of which classes of cases will be found enumerated in an article upon the subject in 13 Am. Law Rev. 283), *are voidable only and not void,* and are therefore capable of ratification by him on arriving at majority. See Ewell's Lead. Cases, 30 *et seq.;* Clark on Contracts (3d Ed.), 185 *et seq.*

8. See, however, Ewell's Lead. Cases, 96 *et seq.*

9. To use the words in which the rule is stated, in Bacon's Ab., "In-

A contract by or with a married woman is one of two sorts: it is either a contract which she entered into **before her marriage,** and which continued in existence afterwards; or it is a contract which she entered into **subsequently to her marriage.** [304]

With regard to the former description of contracts, by the common law, **upon the marriage, the benefit of, and the liability to, the wife's contracts made before marriage, vest in the husband,** and continue vested in him during the continuance of the marriage. **If she die before they are enforced, and he survive her, he is entitled to the benefit of such contracts,** not in his own right, but as her administrator, and is liable to be sued on them, not in his individual capacity, but as his wife's administer. **If she survive him, her right to the benefit of, and her liability upon such contract revives,** assuming always that nothing has been done to put an end to the contract during the continuance of the marriage. [305] "With respect to **debts due to the wife dum sola,** the husband," says Lord Ellenborough, "is her irrevocable attorney, if I may so say, and if he reduce them into possession during the coverture, they become his debt, but until that is done they remain the debt of the wife; and all these cases agree that in the event of his death they would survive to her."

During the marriage the husband may sue or be sued upon his wife's contracts, made while she was a single woman; but **if he sue he must join her as co-plaintiff; and if he be sued, she must be joined as a co-defendant.** [306]

Next, as to **contracts entered into by a married woman subsequently to her marriage.** [307] It is a general rule of common law that **a married woman cannot bind herself**

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fancy," I. 4: "Infancy is a personal privilege of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age; for, being an indulgence which the law allows infants, to secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And, were it otherwise, this privilege, instead of being an advantage to the infant, would in many cases turn greatly to his detriment."

by any contract made during the coverture; not, as in the case of an infant, from any presumption of incapacity, but because she has no separate existence, her husband and she being, in contemplation of law, but one person. [308] She cannot bind herself by any contract made during her coverture, although she is separated from her husband, and has a separate maintenance; nor can she where living in open adultery, although the contract was for goods sold to her, and the vendor knew not of her marriage. Her husband being a foreigner residing abroad is not a sufficient circumstance to make her liable; nor will his having been a bankrupt who had absconded from his creditors, and was residing abroad when the contract was made, render her liable to be sued upon it. [309]

In a word, except so far as the law is qualified by legislation, **the person who contracts with a married woman, as far as any right in a court of law is concerned, relies upon her bare word**; for she is not recognized there as a person capable of binding herself by any contract whatever, save only in a few cases, to be now specified.

The first of these is where her husband is civilly dead: for instance, where he is under sentence of transportation. In such a case, to prevent her from contracting would be to deprive her too of all civil rights, since the husband, being civilly dead, is no longer capable of contracting for her.

Another case is **where the husband is a foreigner belonging to a country at war with Great Britain.** [310] In such case, as he cannot lawfully contract or sue in England, it seems to be admitted that his wife may do so as if she were unmarried.

By the custom of the City of London, a married woman is allowed to be a trader in her individual capacity, and may sue alone in the City courts on contracts made by her in the course of such trade, though not, as it seems, in the superior courts at Westminster, without joining her husband.

Even if a married woman had been divorced a mensa et thoro (which, before the stat. 20 & 21 Vict. c. 85, s. 7, legalized the separation of the parties, but left the marriage bond unsevered), **the same rule applied.**

So far with regard to a married woman's right to bind herself by contract.[1] [311] But **with regard to her power of taking advantage of contracts made by other persons with her, if a contract be made with the wife, on good consideration, during the marriage, the husband may, if he please, take advantage of it,** and recover in an action on it, in which action he may join his wife as a co-plaintiff. And if he die, without taking any such step, the right to sue upon it will survive to the wife. [312] Thus if a bond or promissory note be made payable to her, she and her husband may sue upon it.

What is a reducing into possession by the husband, such as to deprive the wife of her subsequent remedy? [314]

The husband's receipt of interest on a note during the life of the wife is not a reduction of the note into possession; [315] and it seems that receiving money on the note, or bringing an action for it, are alone sufficient reductions into possession.[2]

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1. While the common law of infancy has in the United States been very little changed by statute, the law as to married women has been extensively changed by statute in many of the states and entirely revolutionized in some. The common law upon the subject has been quite well stated in the text and will be found treated at length in Clark on Contracts (3d Ed.), 236 *et seq.*, and in Ewell's Leading Cases (1st Ed.), 245-521 and notes.

For the statutory modifications of the common law the student, after first having made himself familiar with the common law upon the subject and not before, should consult the local statutes and decisions. It will be impossible accurately to understand these without first becoming familiar with the common law upon the subject.

2. For a more full consideration of what amounts to a reduction to possession, see Ewell's Lead. Cases (1st Ed.), 386, 406, 415, 417, 443, 464.

LECTURE IX. [318]

PARTIES TO CONTRACTS.— INSANE PERSONS.— INTOXICATED PERSONS.— ALIENS.— CORPORATIONS.— THE MODE IN WHICH COMPETENT PERSONS CONTRACT.— AGENTS.— PARTNERS.

The next disability in order is that of **persons of non-sane mind**; and with reference to this class of persons, the rule now is that **the lunacy of one of the contracting parties may be shown by himself, if sued upon a contract entered into while he was in that condition**, in avoidance of his contract.[3] [320] The lunatic is not prohibited *absolutely* from binding himself by any contract whatever. Such a prohibition might prevent him from obtaining credit for the ordinary **necessaries** of life; and there are modern cases in which contracts evidently of a fair and reasonable description entered into with a lunatic have been held binding on him and have been enforced.[4]

It seems clear that **a lunatic is liable upon an executed contract for articles suitable to his degree, furnished by a person who did not know of his lunacy, and practised no imposition upon him.** [322] It seems equally clear that he is not liable when the other contracting party has taken advantage of his lunacy.[5]

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3. As a general rule the contracts of insane persons are voidable and not void. Clark on Contracts (3d Ed.), 223; Mitchell v. Kingman, 5 Pick. 431; s. c. Ewell's Lead. Cases (1st Ed.), 522 *et seq.* and notes.

4. Baxter v. Earl of Portsmouth, 5 B. & C. 170; s. c. Ewell's Lead. Cases (1st Ed.), 632; Brown v. Jodrell, M. & M. 105; s. c. 3 C. & P. 30.

5. In the case of Molton v. Camroux, 2 Exch. 487, affirmed in 4 Exch. 17, decided by the Court of Exchequer in 1848, the rule was laid down that *where a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him.* The doctrine of this case has been adopted by subsequent cases in England and Ireland, and has received considerable support in the United States. See Ewell's Lead. Cases (1st Ed.), 614, 626; Clark on Contracts (3d Ed.), 223.

As a lunatic is liable upon such contracts entered into by himself, so **he is liable for necessaries furnished to his wife,** he having become lunatic since the marriage.[6] [324]

But it would seem to be the better opinion that **an executory contract entered into by a lunatic of non-sane mind at the time he entered into it, cannot be enforced against him.**[7] [325]

As to contracts entered into by persons deprived of the use of their ordinary understanding by intoxication, it has been always admitted that **if one man, by contrivance and stratagem, reduced another to a state of inebriety, and induced him, while in that state, to enter into a contract, it would be void [-able]** upon the ordinary ground of fraud. And it may be considered as now settled, that **intoxication, even when not procured by the other party to the contract, avoids the contract when it is so complete as to prevent a man from knowing what he is about;** in that state he is, in common parlance, "not himself," nor are his acts his own. [326]

The contract, however, of a man too drunk to know what he is about, is voidable only, and not void, and therefore capable of ratification by him when he becomes sober.[8] [327]

Aliens are either alien friends or alien enemies. **Alien friends have a right to contract with the subjects of this country,** and may sue on such contracts in the courts of this country, whether the contract was made in England or abroad; with this **distinction,** that **if it was made in England, it is expounded according to the law of England; if abroad, according to the law of the country where it was made;** but whether it was made abroad or in England, **the person who sues on it here must take the remedy here as he finds it,** although, perhaps, abroad there might have been a more advantageous one.[9]

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6. Clark on Contracts (3d Ed.), 226.

7. Mitchell v. Kingman, 5 Pick. 431; s. c. Ewell's Lead. Cases (1st Ed.), 522, 525, 526, note; Clark on Contracts, *supra*.

8. Clark on Contracts (3d Ed.), 233; Ewell's Lead. Cases (1st Ed.), 728-740 and notes.

9. Huber v. Steiner, 2 Bing. N. C. 202.

With regard to alien enemies, *i. e.*, aliens whose government is at war with this country, **all contracts made with them are wholly void.** [330] Indeed, it has been held that if the contract was made during war, it does not become capable of being enforced even on the return of peace; although if a contract be made with an alien friend, and a war afterwards breaks out between his country and this, the effect is to suspend his right to sue upon the contract until the return of peace, not wholly to disqualify him from suing.[1]

By the common law, aliens may acquire and possess within this realm, by gift, trade, or other means, any goods personal whatever, as well as an Englishman.[2] [331]

Another class of persons who are disabled from enforcing contracts are **outlaws, and persons under sentence for felony.** They are, however, liable upon the contracts made by them while in that situation, though incapable of taking advantage of them. This disability is removed by pardon; and when the attainder or outlawry is removed, the party may contract and sue as before.

A corporation aggregate consists of a number of individuals united in such a manner that they and their successors constitute but one person in law. [332] Such a corporation **contracts by its common seal,** which, being affixed to the contract, authenticates it, and makes it the deed of the corporation; **and, as a general rule, that is the only way in which a corporation can contract.**[3] [333]

This general rule is, however, subject to **exceptions,** the principal of which appears to be convenience, amounting almost to necessity. [334] Hence the retainer by parol of an inferior servant, authorizing another to drive away cattle, damage feasant, to make a distress or the like, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions. In such cases the head of the corporation has from the earliest time been considered as delegated by the rest to act for them. [335]

There is, however, a **distinction between matters which do and matters**

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1. See Clark on Contracts (3d Ed.), 181-183.

2. See Blackstone (vol. 1), title Aliens.

3. In the United States a corporation, unless restricted by its charter or by statute, may contract in the same manner as a natural person. Clark on Contracts (3d Ed.), 240; 1 Pars. Contracts (5th Ed.), 139.

which do not affect any interest of the corporation. The former must be authorized by the corporate seal. Thus they must appoint a bailiff by deed for entering upon lands for condition broken, in order to revest their estate; but they need not do so where the bailiff is only to distrain for rent. To this rule, also, the convenience of the world has occasioned some other exceptions; the principal of which is, that when a corporation has been created for mercantile purposes, it is allowed to enter without seal into certain contracts which are usually entered into without seal by commercial men. Such a corporation, for instance, may have power to accept bills of exchange, but the power must either be expressly given it, *e. g.*, by act of parliament, or must be necessarily implied from the nature of the business in which the corporation is engaged.[4] [337]

As to the mode in which a competent person may become a party to a contract, this must be in one of two ways: either **personally,** or by the intervention of an **agent.** [366]

Generally speaking, whatever contract a man may enter into in his own person, he may, if he think fit, appoint an agent to enter into in his behalf. [367] And it seems that, **unless strictly required to be signed by the principal, it is sufficient if a contract, required to be in writing, be signed by an authorized agent.**[5] [368]

When, however, a man is himself an agent, he cannot appoint an agent to transact the matters intrusted to his own agency.[6] This rule does not apply where the principal expressly gives his agent power to appoint a deputy.[7] [369]

This subject may be conveniently distributed under four heads: —

1. Who may be an agent. [369]
2. How an agent is appointed.
3. How far his contracts bind his principal.

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4. *As to what contracts a corporation may make,* the general rule is stated to be that a corporation, having been created for a specific purpose, not only can make no contract forbidden by its charter, or act of incorporation which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. Ang. & Ames on Corp., § 256. Except as so restricted it is said to have the implied power to enter into any contract which is reasonably incidental to the accomplishment of the objects for which it was created. Clark on Contracts (3d Ed.), 240.

5. Morton v. Copeland, 24 L. J. (C. P.) 169; Clark on Contracts (3d Ed.), 439.

6. Cowles' Case, 9 Co. 766; Cobb v. Becke, 6 Q. B. 930.

7. Lord v. Hall, 8 C. B. 627.

4. How far the principal may be advantaged by them.

1. **Who is competent to be an agent?**

It by no means follows that a person who is not competent to contract himself is therefore not competent to contract as agent for another person; thus it has been decided that **an infant may be an agent, or even a married woman,** though she could not have contracted in her own right.[8]

But it is held that, upon the peculiar wording of the **statute of frauds,** one of two parties entering into a contract, **such as we have seen that act requires should be in writing and signed by the party to be charged thereby, cannot be agent for the other, even with that other's consent, so as to bind him by his signature to such a writing.**[9] [371] But it seems to be no violation of this requirement,— the hand of the agent or the principal, — that the *agent* of the one party should act as the agent of the other, although, of course, in such a case clear evidence would be required to show his authority, constituting him the agent of the latter.[1] [372]

2. **In what manner is an agent to be appointed?**

Whenever there is no particular rule of law or special statutory provision pointing out a particular mode of appointment, he may be appointed even by bare words. [373] But there are some cases in which the common or statute law *does* require a particular mode of appointment; for instance, it is a rule of common law that **an agent who is to contract for his principal by deed, must himself be appointed by deed.**[2]

Again, a corporation, as it can, generally speaking, do no act except by deed, so it cannot, generally speaking, appoint an agent in any other way.[3] [374]

With regard to the case of a statute requiring a particular mode of appointment, you may take, for example, **the statute**

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8. Tiffany on Agency, 107.

9. Wright v. Dannagh, 2 Camp. 203; Farebrother v. Simmons, 5 B. & Ald. 333.

1. Bird v. Boulter. 4 B. & Ad. 443.

2. Tiffany on Agency, 20, 21.

3. This rule does not prevail in this country. Ang. & Ames on Corp., §§ 282, 283; Tiffany on Agency, 31.

of frauds, the first, second, and third sections of which require, in express terms, that the agent who is to do any of the acts mentioned in those sections shall be appointed by writing, whereas the fourth and seventeenth sections contain no such provision. The consequence, of course, is, that in cases within these latter sections the agent's authority need not be in writing.[4]

3. **In what cases is the principal bound by his agent's contract?**

So far as the agent's authority extends, his principal is bound by all acts done in pursuance of that authority.

The **cases** in which doubts and difficulties arise are those **in which the agent has gone beyond his authority**, and then the question arises whether his principal shall or shall not be bound by it. **A general agent** is an agent intrusted with all his principal's business in some specific line, of some specific kind. [375] **A particular agent** is an agent employed specially for some one special purpose. There is this important **distinction between contracts made by general, and those made by particular agents**, namely, that **if a particular agent exceed his authority, his principal is not bound by what he does; whereas, if a general agent exceed his authority, his principal is bound, provided what he does is within the ordinary and usual scope of the business he is deputed to transact.**[5]

With regard to general agents, there is, for the further protection of the public, this further rule, *that* **the authority of a general agent is, as far as the public are concerned, measured by the extent of his usual employment**; [379] and therefore the rule is, that where a man permits another to act generally for him in any line of business, he is bound by contracts made by that other in that line of business; although, in truth and in fact, the person so acting may have a limited authority, or even no authority at all.[6] [380]

If there is at a particular place an **established usage** in the manner of dealing and making contracts, a person who

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4. Tiffany on Agency, 29.

5. Provided, of course, that the third person has no notice that the agent is exceeding his actual authority. Tiffany on Agency, 180.

6. See next note, *supra*.

is employed to deal or make a contract there has an implied authority to act in the usual way. [386] But the principal will not be bound by any rule or custom of trade made after the transaction was completed, however it might bind the agent; and if he deviates from the course usual in the line of business in which he is employed, he not only has no authority, in fact, but does not seem to have any, and, consequently, cannot bind his principal thereby.[7] [388]

Wherever acts are done inconsistently with express directions or with the customary transactions from which agency may be implied, there is an excess of authority, and the principal is not bound.[8] [390] **A subsequent ratification is equivalent to a prior command,** and the great maxim of agency, "*Qui facit per alium facit per se,*" has a retrospective effect. [391] Such ratification may be inferred from the conduct of the principal, as well as expressed by him in words.[9]

The principal cannot ratify a part of the transaction and repudiate the rest, but must adopt the whole or none.[1] **But where a person at the time of doing an act does not profess to be therein acting as an agent, there is nothing, strictly speaking, to ratify;** and another person, however interested, cannot afterwards, by adopting the act, make the former his agent, and thereby incur any liability or take any benefit under the authorized act.[2] [392]

Wherever the person who contracts with an agent knows that that agent's authority is limited, and nevertheless contracts with him beyond those limits, he does so at his peril, for the principal is not bound.[3]

7. See Tiffany on Agency, 174.
8. See preceding note.
9. As to what acts may be ratified, see Tiffany on Agency, 48.
1. Brewer v. Sparrow, 7 B. & C. 310.
2. See Tiffany on Agency, 70.
3. Tiffany on Agency, 180.

LECTURE X. [394]

PRINCIPAL AND AGENT.—THEIR RESPECTIVE LIABILITIES.—AGENCY OF BROKERS, FACTORS, PARTNERS, WIVES.—RECAPITULATION.—REMEDIES BY ACTION.—STATUTES OF LIMITATION.

As regards the power of the principal to take advantage of his agent's contracts, where the agent, when he makes the contract, states who his principal is, and states that he is contracting on the behalf of that principal, or where (though there may be no express statement to that effect) the circumstances of the transaction can be shown to have been so completely within the knowledge of the parties to it that there can be no doubt that it was understood at the time that the person who actually made the contract made it as an agent, and intended to make it on behalf of his principal; in such cases **the principal has a right to take advantage of it, and enforce it to the fullest extent.**

Where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure as if the agent had been the contracting party.[4] [396]

But if the purchaser knew all along that he was dealing with an agent, he cannot set off, in an action by the principal for the price of goods bought by him of the agent, **a** debt due from the agent to himself.[5] [398]

Where the principal does not intervene, but allows the agent to sue in his own name, two consequences follow: first, the defendant may avail himself of all defences which would be good against the agent, who is by the supposition the plaintiff on the record; secondly, he may avail himself of those which would be good against the principal for whose sole use the action has been brought. [400]

An unknown principal, when discovered, is liable on the

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4. Sims v. Bond, 5 B. & Ad. 393.

5. Baring v. Anie, 2 B. & Ad. 137; Parker v. Donaldson, 2 W. & S. 9.

contracts which his agent makes for him. [401] **On the other hand, if the agent contract without naming any principal, he is himself the person prima facie responsible;** and though the other party may, in most cases, elect to charge the employer on discovering him, yet he need not do so, but may, if he please, continue to look to the agent. He may also elect to charge either the agent or his principal, where the agent, at the time of making the contract, says that he has a principal, but declines to say who that principal is. [402] This election when once made, is binding.

The rule upon this subject is thus laid down by Lord Tenterdem: "If a person sells goods, supposing at the time of the contract that he is dealing with the principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, *subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.* [403] On the other hand, if, at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge, deals with him, and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other."[6] [404]

Where a British merchant is buying for a foreigner, according to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner, although, of course, a contract may be made by the agent so as to charge the foreigner and not himself. [405] **The**

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6. See, generally, the leading cases, Paterson v. Gandasequi, 15 East, 62; 2 Smith's L. C. (7th Am. Ed.) *348; Addison v. Gandasequi, 4 Taunt. 573; 2 Smith's L. C. *353; Thompson v. Davenport, 9 B. & C. 78; 2 Smith's L. C. *358 and notes; Tiffany on Agency, 364, 365.

question, which is liable — the foreign principal, or the English agent — **is one of intention,** in which the fact that the principal debtor is a foreigner residing abroad, renders it highly improbable that the credit should have been given to him.

But there is this **qualification to the right of election,** namely, that if the state of accounts between the agent and principal have been altered, so that the principal would be [unjustly] subjected to a loss by the other contracting party's election, the right of election is in such case lost. **Still, this qualification is itself subject to a minor one,** namely, that the principal cannot, by prematurely and improperly settling with his agent, deprive the other contracting party of his right of election.[7] [406]

An agent making and signing a contract as such would in general, in the absence of a custom to the contrary, not be liable or entitled to sue upon it.[8] [411] Yet, in "every contract, if the agent chooses to make himself a contracting party, the other contracting party may either sue the agent who has himself contracted, though on behalf of another, or he may sue the principal who has contracted through his agent; and this, whether the principal was known at the time or not, or whether it was or was not known that he was a principal."[9] [412] And as in such a case the agent is liable, so also he has a right to sue.

Partnership is the result of a contract whereby two or more persons agree to combine property or labor for the purpose of a common undertaking, and the acquisition of a common profit.[1] [413] One party may contribute all the money, or all the stock, or all the labor necessary for the purposes of the firm. But in order to make people liable as partners to each other, it is necessary that there should be a community of profits, although one of them

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7. See next note, *supra*.

8. Fleet v. Murton, L. R. 7 Q. B. 129.

9. Christofferson v. Hansen, L. R. 7 Q. B. 513, per Blackburn, J.

1. See *post*, where the subject of partnership receives special treatment.

See, generally, as to what constitutes a partnership, Gilmore on Partnership (1911), ch. 1.

may stipulate to be indemnified against loss. This, however, respects their mutual claims, for, however they may stipulate with each other, all who take a share in the profits, and all who allow themselves to be described and held out as partners, are liable as such to those to whom they have so held themselves out.

Supposing the parties to have become partners, the result is that **each individual partner constitutes the others his agents for the purposes of entering into all contracts for him within the scope of the partnership concern**, and consequently that he is liable to the performance of all such contracts in the same manner as if entered into personally by himself.[2]

In general no new member can be introduced into the partnership without the consent of all the partners.

Where there is no specific authority, the individual members will be liable upon the partnership contracts, or not, according as the contract is in the ordinary course of the partnership business or not.[3] [414]

There is nothing, however, to prevent the parties from confining the credit to an individual partner; and it is a question for the jury whether this has or has not been done. [415] **If a person contract with another person, knowing him alone in the transaction, he may sue him only.** If, after the contract be made, he discover that he had a secret partner who had an interest in the contract, he is at liberty to sue that secret partner jointly with him, but he is not bound so to do. [416] If a person, contracting with another for goods, delivers an invoice made out to a firm, and nothing is said as to the persons composing it, he takes his chance who are the partners in that firm. [417] If, indeed, the party represents himself as the only person composing the firm, an action may be brought against him alone; or if, on being asked who his partners are, he refused to give

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2. The powers of partners among themselves are governed by the partnership agreement. Gilmore on Partship, 275. As to third parties the rule is well stated in the text, *supra*. See Gilmore on Partnership, 276.

3. See next note, *supra*.

any information, that might be evidence for the jury to say whether he did not hold himself out as solely liable.[4]

The liability arising from the naked fact of partnership is prima facie the liability of all the partners, and may be rebutted by direct evidence that credit was not given to the partnership, but to an individual member of it.[5] [419]

The debt for which an action is brought must have accrued during the time the party sued was actually in partnership. [420] He will be liable neither for contracts made before he became a partner, nor after he ceases to be one, provided he gives proper **notice of his retirement.**[6]

Dormant partners are equally liable with ostensible partners upon all contracts [not under seal] **made for the firm during their partnership.**[7]

Nominal partners are as liable as dormant ones. But the claims for which a parner merely nominal is liable, must arise out of credit really given to the fact that he was a partner when the credit was given.[8] [421]

A general notice is sufficient to discharge partners who retire from firms as regards the world at large; but an express notice is requisite to discharge them as regards previous customers. [422] This being given, the retiring partner is effectually discharged from all debts subsequently accruing; nor can he be made liable by any unauthorized use of his name by his previous partners, though his liability, as well as his power to make admissions, or to release or sue for debts contracted during his partnership, of course remains.[9]

Where bills are drawn by partners in trade, the general authority implied by the custom of merchants binds each partner; but not so where the partnership is not of a commercial nature, such as that of attorneys, for instance, in which case it must be shown that the party accepting or

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4. Bonfield v. Smith, 12 M. & W. 405, per Abinger, C. B.

5. Beckham v. Knight, 4 Bing. N. C. 243.

6. Vere v. Ashby, 10 B. & C. 288; Heath v. Sansum, 4 B. & Ad. 172; Parker v. Caruthers, 3 Esp. 248.

7. Robinson v. Drummond, 2 B. & Ad. 308.

8. Dickenson v. Valpy, 10 B. & C. 128.

drawing had special authority to do so, even where it is done in the name of the firm.[1] [423] **Where one partner signs for the firm, being authorized to do so, and describes himself as signing for the firm, he is not separately liable, but the firm alone.** If he accepts, professing to have authority which he has not, a bill addressed to the firm, he makes himself liable thereby.[2]

Partners are not liable for the fraudulent contracts of a co-partner, if they can prove the knowledge of the fraud by the plaintiff.[3] Neither are they bound where an express warning was given to the plaintiff by the partners sought to be charged.

Factors are intrusted with the possession of the property they are to dispose of; brokers are intrusted with the disposal, but not with the possession. [424] The latter, therefore, are mere middle men between the two parties contracting, and cannot sue in their own name upon contracts made by them as brokers. Neither are they liable upon contracts so made, unless there be an usage in the particular trade to make the broker, though contracting as such, personally liable. And evidence of such usage is admissible, even though the contract of sale be in writing. The contract between the parties employing the broker is

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9. Abel v. Sutton, 3 Esp. 108.

In Farrar v. Deflinne, 1 Car. & K. 580, the defendant had been a dormant partner, but ceased to be so before the debts accrued for which the action was brought. The plaintiff had known of the partnership, but the dissolution not having been advertised, he had no knowledge of it. Mr. Justice Cresswell said, in summing up the case: "The law stands thus: if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient *for all but actual customers;* these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired; but if the partnership had become known to any person or persons, he would be in the same situation *as to all such persons*, as if the existence of the partnership had been notorious."

1. Hedley v. Bainbridge, 3 Q. B. 316.

2. Ex parte Buckley, 14 M. & W. 469.

3. Musgrave v. Drake, 5 Q. B. 185.

the contract of employment, and not the contract of sale, and the custom is attached to the employment.[4]

In practice, the **bought and sold notes,** which are memoranda of the purchase and sale, signed by the broker, and sent to the parties, are considered as constituting the complete proof of the contract. [426]

As factors are intrusted with the possession of goods usually for the purpose of selling them, the ordinary rules applying to agents apply to them, so far as they are exercising their authority to sell. [428] The mere relation of principal and factor confers ordinarily an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer; but if he receives the goods subject to any special instructions, he is bound to obey them. [429] But this being the factor's usual employment, it is obvious that **if he pledges the goods** which he is authorized to sell, he does not act in the usual course of his employment; and if he had not an express authority to pledge, he could not, by pledging, confer any right on the pledgee.[5]

As to a wife's power to bind her husband by contract, the rule is that whenever a wife's contract made during marriage binds the husband, it is on the ground that she entered into it as his agent.[6] [431] She may be appointed his agent in the same way that any other individual may, either by express words or by implication. [432] Thus where goods for which a wife has ordinarily authority to contract on the part of her husband, such as articles of dress, are ordered by her and delivered at his residence,

4. A factor is distinguished from a broker by being entrusted with the possession, management and control of the goods and by being authorized to buy and sell in his own name as well as that of his principal. Burr. Law Dic.

5. See 1 Pars. on Contracts (5th Ed.), 93. These subjects are more fully treated in Agency, *ante*.

6. It is a principle, as old as the time of Fitzherbert, that, whenever a wife's contract made during marriage binds the husband, it is on the ground that she entered into it as his agent. Fitz. Nat. Brev., 27, C.; Ibid., 118, F.; Ibid., 120, G. See, also, Sawyer v. Cutting, 23 Verm. 486; Leeds v. Vail, 15 Penn. St. 185.

where she also resides, *prima facie* the husband is liable. [433]

There is a peculiar sort of agency, which is implied from the circumstance of two persons living together as man and wife, from which circumstance a presumption arises that the wife has authority to bind the husband by her contracts for necessaries suitable to his fortune and rank in life. [434] **The contract, however, must be for necessaries, and the party making it must not have been forbidden to trust her.**

What are necessaries depends upon the circumstances of the particular case under discussion for the time being.[7] [435]

The points hitherto considered all arise in cases in which the husband and wife continue to live together. **But if the wife, when she makes the contract, is living separated from her husband,** the case is quite different; and the only question is, whether the separation is with the husband's assent, or produced by the husband's misconduct. [439] **If the husband drive his wife from home, or if he do so miscon-**

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7. See, generally, Manby v. Scott, 1 Lev. 4; 1 Sid. 109; 2 Smith's L. C. (7th Am. Ed.) *406; Montague v. Benedict, 3 B. & C. 631; 2 Smith's L. C. (7th Am. Ed.) *427; Seaton v. Benedict, 5 Bing. 28; 2 Smith's L. C. *431.

"The cases most frequently referred to on the subject are Montague v. Benedict and Seaton v. Benedict, *supra*. The name of the defendant probably strikes you as fictitious, and in truth it is so, being taken from a play of Shakespeare, called *Much Ado About Nothing*, in which one of the characters is a young officer named Benedict, who protests vehemently against marriage. The real defendant was a highly respectable professional gentleman; and it was sought in Seaton v. Benedict to charge him with a bill contracted by his wife for articles of millinery of a very expensive description. It appeared at the trial that she was already supplied with all necessary articles of dress; and the court held, on a motion for a new trial, that the defendant was in point of law entitled to the verdict."

"In the other case of Montague v. Benedict, the goods supplied were articles of jewellery, to the amount of £83, which had been delivered in the course of two months. The plaintiff's evidence was, that the defendant lived in a furnished house of which the rent was £200 a year, and that the lady had a fortune of £4000; the defendant's that the lady was already supplied with sufficient jewellery. The jury found a verdict for the plaintiff; but the court set it aside, on the ground that there was no evidence to support it." Smith on Contracts (6th Ed.), *435.

duct himself that it is morally impossible and unreasonable that she should continue to reside in his house, he sends her into the world with authority to pledge his credit for her necessary expenses. And this authority he cannot revoke or control by any notice or prohibition whatever. Even if the husband became **lunatic**, and therefore unable to provide his wife with necessaries, he is in the same situation as a husband omitting to furnish them. But the authority of the wife to pledge her husband's credit is no greater in the case of a lunatic than in the ordinary case of husband and wife. [440]

In like manner, if the husband and wife mutually consent to live apart, she has a right to bind him by contracting for her reasonable and necessary expenses as long as the consent continues. But in those cases in which the wife, living apart from her husband, has authority to bind him by contracts for necessaries, **if he allow and pay her a sufficient maintenance, the authority is gone,** and her contracts, even for necessaries, will not bind him. And if the wife when living separate has a sufficient maintenance, though not paid by her husband, supplies furnished to her cannot be necessaries for which he is liable.

But when the separation is occasioned neither by his misconduct nor consent, she has no authority at all to pledge her husband's credit, and the person who contracts with her does so at his peril. [441] And where a married woman is found living apart from her husband, the *prima facie* presumption is, that it is neither in consequence of his improper conduct nor by his assent, and therefore **it always lies on the person who gave her credit to show what were the circumstances under which they separated.**

Where the wife, in consequence of the circumstances under which she separated from her husband, **has authority to bind him by contracts, those contracts must be for necessaries suitable to his rank and means.** What *are* such necessaries, is a question which turns on the particular circumstances of each case.[7a] [442]

7a. See the text for instances.

The wife also may under some circumstances pledge her husband's credit for such necessaries for their children as may be reasonable with reference to the husband's station. [444] Thus where an infant is by law properly in the care of the wife, the reasonable expenses of providing for it are part of the reasonable expenses of the wife, for which she has authority to pledge her husband's credit. [445]

The whole of this branch of the law may be shortly summed up thus: while a wife continues to live with her husband, the presumption is that she has authority to bind him by contracting for necessaries; but that presumption is subject to be rebutted. When she is living separately from him, the presumption is that she has no such authority; but that presumption also is subject to be rebutted, by showing that the separation was by consent, or occasioned by the husband's misconduct; in which cases, if he leave her without adequate funds for her support, she has a right to pledge his credit by contracting for necessaries.[8]

The ordinary remedy in a court of law for breach of contract is by action, and there are distinct forms of action applicable to the breach of distinct species of contract. [449]

If the contract be by record, the remedy is by writ of scire facias, which lies only upon a record, and which has obtained its name from the Latin words it formerly contained, commanding the sheriff to make the defendant know that the court commanded his appearance to answer why execution should not issue against him.

If the record create a debt, that is, render a sum certain payable by the one party to the other, an action of debt will lie to enforce payment, if the plaintiff prefer that form of proceeding to a *scire facias*.

The action of debt lies in every case where there is a liquidated pecuniary duty from one person to another. In such case judgment by default is final.

If the contract be by deed, the remedy is by action of covenant, which lies to enforce a contract by deed, for which it is the only remedy at common law, unless the contract

8. See, generally, as to necessaries, Ewell's Lead. Cases (1st Ed.).

be for payment of a liquidated sum, in which case, as I have already said, the plaintiff may, if he prefer it, maintain an action of debt. [450]

If the contract be neither by record nor by deed, — If, in other words, it be a simple contract, either reduced to writing, or by mere words without writing, — the remedy, unless it be for payment of a fixed sum of money, in which case debt also will lie, is by an action of assumpsit.[9]

The time within which those remedies are to be pursued depends upon the provisions of the acts of parliament which we call **Statutes of Limitation.**[1] [451]

The periods of limitation prescribed by the statute begin to run from the accruing of the cause of action; [454] [that is, from the time when the creditor could have commenced his action.]

Construction of contracts. The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and **it is the duty of the jury to take the construction from the court,** either absolutely, if there be no words to be construed as words of art or phrases of

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9. As to remedies, see, generally, *post*, Pleading and notes.

1. From the limitations introduced by the English statute, 21 James I., c. 16, there were certain *excepted cases*, which exceptions have, with more or less modifications, been pretty generally incorporated into the statutes of the several states. *By the statute of James, if the plaintiff at the time of the accruing of the cause of action was an infant, a married woman, non compos mentis, imprisoned, or beyond the seas, the period of limitation did not begin to run till the removal of the plaintiff's disability.*

An acknowledgment of indebtedness amounting to or implying a new promise, or a part payment, will in general take a case out of the statute; and in such case the statute begins to run from the time of such acknowledgment or part payment.

The statute of 21 James I. was applicable to all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; and similar provisions have been re-enacted in many of the United States. The statutes of limitation in the several states are so various that the student will find it necessary to consult the statute of his own state for details.

commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. [485]

The same sense is to be put upon the words of a contract in an instrument under seal as would be put upon the same words in any instrument not under seal. [487] And the rule of construction is the same, whether in a civil or a criminal court, or whether in a court of law or equity.[2]

In the first place, **it is the most important of all the rules of construction, that the whole of the agreement is to be considered.**[3] Such a meaning is to be given to particular parts as will, without violence to the words, be consistent with all the rest, and with the evident object and intention of the contracting parties. [488]

An important instance of the rule under consideration is, that **where general words follow others of more particular meaning, they are to be construed as applicable to things ejusdem generis with the former particular words.**[4] [502]

It is obvious that if the whole of the agreement is to be considered, **the place where it was made, the time when, the objects of the parties, and the department of science or art, trade or commerce, to which the subject-matter of it belongs, must be regarded**; for, otherwise, the meaning of words which have peculiar acceptations at different times and places, and in relation to different subject-matters, cannot be accurately understood. [505] But bearing in mind

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2. "It would have appeared needless to remark that the same sense is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in any instrument not under seal, if the question had not actually been raised in argument; for the same intention will be expressed by the same words in a contract in writing whether with or without seal. Nor can it signify in what court the instrument is construed; for the question, what is the meaning of the contract, cannot be affected by the question, what is to be the consequence of the contract, or what the remedy for the breach, or by any other matter in which the *practice* of the courts may differ. The rule of construction, therefore, must be the same, whether in a civil or a criminal court, or whether in a court of law or equity." Text, pp. 486, 487.

3. Moneypenny v. Moneypenny, 28 L. J. (Ch.) 303; 31 id. 269; and 9 H. L. C. 114.

4. Cullen v. Butler, 5 M. & Sel. 461.

these observations as to the peculiar meaning which words sometimes bear, to the context of the whole contract, the usual and proper mode of understanding words is according to their ordinary sense and meaning.[5] [506]

These are the principal rules for the construction of contracts. [508] There are others, less general, which are sometimes referred to. They will be found very clearly treated of in Broom's Maxims, last edition; and both these and the more general rules which it has been attempted to illustrate in this volume are explained at large in Shepard's Touchstone.[6]

5. Prest v. Dowie, 33 L. J. (Q. B.) 172; Barton v. Fitzgerald, 15 East, 530.

6. A large collection of rules for the construction of statutes will be found in the 41st chapter of Blackwell on Tax Titles. See, generally, Black on the Construction and Interpretation of Statutes; Clark on Contracts, ch. 10.

PRIVATE CORPORATIONS.

PRIVATE CORPORATIONS.

CHAPTER I.

DEFINITIONS, ETC.

A corporation aggregate is a body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person.[1]

The following definition of a corporation is given by Chief Justice Marshall, in the celebrated case of Dartmouth College v. Woodward:[2] "**A corporation,**" says the Chief Justice, "**is an artificial being, invisible, intangible,** and existing **only in contemplation of law.** Being the mere creature of law, it possesses only those properties, which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are *immortality,* and, if the expression may be allowed, *individuality;* properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the harzardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual

1. Browne's Civil Law, 99; Civil Code of Louisiana, tit. 10, ch. 1, art. 418; 2 Kent, Com. 215; 1 Kyd. Corp. 13.

2. 4 Wheat. 636.

succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such a power or character on a natural person. It is no more a State instrument, than a natural person, exercising the same powers, would be." In a subsequent case, the same learned Judge says: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."[3]

The words *corporation* and *incorporation* are frequently confounded, particularly in the old books. The distinction between them is, however, obvious; the one is a political institution; the other only the *act* by which that institution is created.

When a corporation is said to be a *person*, it is understood to be so only in certain respects, and for certain purposes, for it is strictly a *political* institution. The construction is, that when "persons" are mentioned in a statute, corporations are included if they fall within the general reason and design of the statute.[4]

The immortality of a corporation means only its capacity to take, in perpetual succession, as long as the corporation exists; so far is it from being literally true that a corporation is immortal, many corporations of recent creation are limited in their duration to a certain number of years. A corporation may not only be limited, as to duration, in its commencement, but, without limitation, may be dissolved, and consequently cease to exist, for want of members; also by voluntary surrender of franchises, forfeiture by misuser, &c.[5]

The word corporation often signifies **a community clothed with extensive civil authority**; and a community of that kind is sometimes called a **political**, sometimes a **mu-**

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3. Providence Bank v. Billings, 4 Pet. 562. See, also, for other definitions, 4 Bl. Com. 467; Clark on Corporations (2d ed.), 1. All references to Clark on Corporations are to the second edition published in 1907.

4. School Directors v. Carlisle Bank, 8 Watts, 291; Blair v. Worley, 1 Scam. 718.

5. See 2 Kent, Com. 215; Clark Corp. (2d ed.), 13, note 36.

nicipal, and sometimes a public corporation. It is generally called public, when it has for its object the government of a portion of the State.[6]

There is another general division of corporations, which has relation to the number of persons of which the corporation is composed; and that is, sole and aggregate. A *sole* corporation, as its name imports, consists only of *one* person, to whom and his successors belongs that legal perpetuity, the enjoyment of which is denied to all natural persons.[6a]

The King of England is an example of a sole corporation, and so also, it is considered, is a bishop and a vicar in that country. Thus, the parish minister of a church in England, is said to be seised, during his incumbency, of the freehold of the land, with which his church is endowed, as *persona ecclesiae;* and he is deemed capable, as a sole corporation, of transmitting the land to his successors.[7]

Sole corporations, it is believed, are not common in the United States. In those States, however, where the religious establishment of the Church of England was adopted, when they were colonies, together with the common law on that subject, the minister of the parish was seised of the freehold, as *persona ecclesioe,* in the same manner as in England; and the right of his successors to the freehold, being thus established, was not destroyed by the abolition of the regal government, nor can it be divested even by an act of the State legislature.[8] In Massachusetts, also it has been held that a minister seised of parsonage lands, in the right of the parish, is also a sole corporation for this purpose, and holds the same to himself and his successors.[9]

Private corporations are divided into ecclesiastical and lay. *Ecclesiastical* corporations are such as are composed of members who are associated in or the advancement of religion. They may be either sole, as a bishop, or parson, or aggregate, as in former times were the abbot and monks.[1]

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6. See Tinsman v. Belvidere R. Co., 2 Dutch. 148.

6a. 1 Bl. Com. 469. See, also, Clark on Corp. 23.

7. Baron Gilbert, in his Treatise on Tenures, says, that anciently abbots and prelates were supposed to be married to the Church, inasmuch as the right of property was vested in the Church, and the possession in the abbot or bishop. *Gilb. Ten.* 110.

8. Town of Pawlet v. Clark, 9 Cranch, 328.

9. Brunswick v. Dunning, 7 Mass. 447; Weston v. Hunt, 2 Mass. 501.

1. Terrett v. Taylor, 9 Cranch, 43. The first sort of corporation, says Ayliffe, in his Treatise on the Civil

Before the reformation and the dissolution of monasteries, ecclesiastical corporations were of three kinds. The first consisted of those who were called the secular clergy, that is, a clergy composed of persons having communion with the world, like the modern clergy of England, and the clergy of the United States. The second were composed of monks, who were bound by a solemn vow entirely to renounce all intercourse with the world, and to spend their days in common together, under the direction of superiors, and according to regulations prescribed by the founder. The third were religious communities, the members of which, without any vow to relinquish intercourse with the laity, lived together in common, in order to serve the interests and objects of the church; and such were those, who, under the authority of the bishop, were employed as religious missionaries.[2]

Lay corporations are divided into eleemosynary and civil. Eleemosynary corporations are such as are instituted upon a principle of *charity;* their object being the perpetual distribution of the bounty of the founder of them, to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent, and sick, or deaf and dumb.[3] And of this kind, also, are all colleges and academies which are founded where assistance is given to the members thereof, in order to enable them to prosecute their studies, or devotion, with ease and assiduity.

The reason why the institutions of Oxford and Cambridge are not considered as eleemosynary is, that the stipends, which are annexed to particular magistrates and professors, are *pro opera et labore*, and are not merely charitable donations, since every stipend is preceded by service and duty.[4] Dartmouth College, in New Hampshire, on the other hand, is an eleemosynary corporation, because it was founded by private benefactors for the distribution of private contributions.[5] And the corporation of Dartmouth College would not be an ecclesiastical corporation, even if it was composed entirely of ecclesiastical persons, because the object of it is not entirely ecclesiastical.[6]

Civil corporations include not only those which are public, as cities and towns, but private corporations created for

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Law, has a respect unto such persons, whose principal business regards religion, as chapters of cathedral, or collegiate churches, monasteries, and the like; and these are styled *ecclesiastical* corporations. Ayliffe, Civil Law, 196.

2. 2 Domat, Civil Law, 452.

3. 1 Kyd, 26; American Asylum v. Phoenix Bank, 4 Conn. 272; McKim v. Odom, 3 Bland, Ch. 407.

4. 1 Bl. Com. 472.

5. Dartmouth College v. Woodward, 4 Wheat. 681.

6. Id; and 4 Bl. Com. 471.

an indefinite variety of temporal purposes. They comprehend institutions of learning, and it has been long established, that the universities of Oxford and Cambridge, in England, notwithstanding their subjection to the influence of the church, are civil corporations; though anciently they were deemed ecclesiastical.[7] But the most numerous, and, in a secular and commercial point of view, the most important class of private civil corporations, and which are very often called "companies," consists, at the present day, of banking, insurance, manufacturing, and extensive trading corporations; and likewise of turnpike, bridge, canal, and railroad corporations.[8]

CHAPTER II.

HOW AND BY WHOM PRIVATE CORPORATIONS MAY BE CREATED.

In England, the king or queen alone, when a corporation is intended with privileges, which, by the principles of the English Law, may be granted by the king, is qualified to create a corporation by his or her sole charter.

Thus the city of Annapolis, in Maryland, was incorporated by a charter from Queen Anne, when she held the government of the Province.[1]

When, on the other hand, it is intended to establish a corporation vested with powers which the king cannot of himself grant, recourse must be had to an act of parliament; as if it be intended, for example, to grant the power of imprisonment, as in the case of the College of Physicians; or to confer a monopoly, as in the case of the East India Company;[2] or when a court is erected, with a power to proceed in a manner contrary to the rules of the Common Law.[3]

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7. 1 Bl. Com. 471.

8. See, generally, Clark Corp. 23 *et seq.*

For the distinction between corporations and partnerships and limited partnerships, see Partnership, *post.*

1. See note to p. 416 of 3 Bland, Ch.

2. Burke's Speech on the India Bill.

3. I Kyd, 61; Cro. Car. 73, 87. In the United States Corporations are usually organized under general statutes, prescribing the method of organization, duration, powers, etc.

All the corporations, which are said in the English books to have been created by the *Common Law* and by *prescription*, imply the sanction of government. The corporations, existing in England by virtue of the Common Law, are supposed to have been warranted by the concurrence of former governments; Common Law being, in fact, nothing more than custom arising from an universal assent. The tenure of the king, and of all bishops, parsons, etc., to their respective offices, is founded on the principle just stated.[4] So, also, in the case of corporations, which are said to exist by *prescription*, such, for example, as the corporation of the City of London, and others which have enjoyed and exercised corporate privileges from time immemorial; they are in the eye of the law well founded; for though no legal charter can be shown, yet the legal presumption is, there once was a charter, which, owing to the accidents of time, is lost or destroyed.[5] A corporation by prescription, has been said to be a corporation which has existed from time immemorial, and of which it is impossible to show the commencement by any particular charter or act of parliament, the law presuming that such charter or act of parliament once existed, but that it has been lost by such accidents as length of time may produce.[6]

No precise form of words is necessary in the creation of a corporation.[7] And if the words "found," "erect," "establish," or "incorporate," are wanting, it is not material;[8] for the assent of the government may be given constructively or presumptively without such words.

It was held, in ancient times, if the king granted to a vill *gildam mercatoriam*, it was by such grant incorporated. So, if the king granted to a vill to be quit of toll, it was, for that purpose, incorporated. Or, if he granted lands to them, he gave them a corporate capacity to take, if a rent was reserved. And, in England, there are many instances of grants by charter to the inhabitants of a town, "that their town shall be a *free borough*," and that they shall enjoy various privileges and exemptions, without any direct clause of incorporation; and yet, by virtue of such charter, such towns have been uniformly considered as incorporated.

But the **intention of the legislature** in the enactment of a law concerning associations of persons, to establish them

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Consult the local statutes. See, generally, Clark Corp. 29 *et seq.*

4. 1 Bl. Com. 472; 1 Kyd, 39; Town of Pawlet v. Clark, 9 Cranch, 292.

5. Ibid.; 2 Inst. 330.

6. 1 Kyd, 14; 2 Kent, Com. 277; Town of Pawlet v. Clark, 9 Cranch, 294; Dillingham v. Snow, 4 Mass. 547; Clark Corp. 31, 319.

7. Rex v. Amery, 1 T. R. 575; Clark Corp. 42.

8. 10 Co. 40b.

under corporate organization more or less extensive, must appear plain.[9]

Private corporations, — turnpike and railroad companies, banks, &c.— are created by a charter or act of incorporation from the government, which is in the nature of a contract,[1] and, therefore, in order to complete their creation, something more than the mere *grant* of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be *accepted;* as the government cannot incorporate persons for their benefit, in consideration of the benefit to accrue to the government, or to the public, without the consent of such persons.[2] The intention of such a grant of incorporation is to confer some advantage upon the grantees; but as the grant may be counterbalanced by the conditions which accompany it, the grant must be accepted by a *majority,* at least, of those who are intended to be incorporated.[3]

What will amount to an acceptance, and how it may be proved. Whether a charter has been accepted, will, in a measure, depend upon the circumstance under which it was granted. If a peculiar charter is applied for, and it is given, there can be no reasonable ground to doubt its immediate acceptance. Grants beneficial to corporations, may be presumed to have been accepted, and an express acceptance is not necessary.[4] A corporation created by statute, which *requires* certain acts to be done before it can be considered *in esse,* must show such acts to have been done to establish its existence; but this rule does not apply to corporations declared such by the act of incorporation.[5] If a charter is granted to persons who have not applied for it, the grant is said to be *in fieri,* until there has been an acceptance ex-

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9. Phillips v. Pearce, 5 B. & C. 423; Lawrence v. Fletcher, 8 Met. 153; Medical Institution v. Patterson, 1 Denio, 618, 5 id. 618; Jackson v. Bank of Marietta, 9 Leigh, 240; Clark Corp. 42.

1. Clark Corp. 44.

2. Falconer v. Campbell, 2 McLean, C. C. 196; Clark Corp. 44.

3. Rex. v. V. Chan. Cambridge, 3 Burr. 1661; Clark Corp. 44.

4. Charles River Bridge v. Warren Bridge, 7 Pick. 344. (*b*)

5. Fire Department v. Kip, 10 Wen. 266.

pressed.[6] It may, for a time, remain optional with the persons intended to be incorporated, whether they will take the benefit of the act of incorporation; yet if they organize execute the powers, and claim the privileges granted, the duties imposed on them by the act, will then attach, from which they cannot discharge themselves.[7] The books of a corporation are the regular evidence of its doings, and the acceptance of the charter, should be proved by them. But if books have not been kept, or have been lost or destroyed, or are not accessible to the party upon whom the affirmative lies, then the acceptance may be proved by implication from the acts of the members of the alleged corporation.[8]

A charter must be accepted as it is offered, and without conditions; neither can there be a *partial* acceptance, any more than there can be an acceptance by part of the persons intended to be incorporated.[9] Neither can it be accepted for a limited time.[9a] But if a new charter be given to a corporation already created, there may be a partial acceptance of the second charter; and the body corporate may act partly under the one and partly under the other.[1]

If there has been a user of a corporate franchise, by an association of persons, their existence as a corporation can only be inquired into by the government.[2] A person doing business with a bank, as a corporation, cannot deny its existence;[3] and the execution of a note to a company, payable to them as a corporation, is an admission of their existence as such.[4]

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6. Dartmouth College v. Woodward, 4 Wheat. 688.

7. Riddle v. Pro. of Locks on Merrimack River, 7 Mass. 187; Clark Corp. 44.

8. Hudson v. Carman, 41 Me. 84; Clark Corp. 44.

9. Wilcox on Mun. Corpor. 30; Green v. Seymour, 3 Sandf. Ch. 285; Rex v. Passmore, 3 T. R. 240; Rex v. Amery, 1. T. R. 589; Rex v. Cambridge, 3 Burr. 1356.

9a. Rex v. Bazeu, 4 M. & S. 255.

1. Rex v. Cambridge, 3 Burr. 1656-1661.

2. Thompson v. New York R. Co., 3 Sandf. 625; Methodist Episcopal Church v. Pickett, 19 N. Y. 482; Elizabeth City Academy v. Lindsay, 6 Ired. 476; Grand Gulf Bank v. Archer, 8 Smedes & M. 151; Duke v. Cahawba New Co., 10 Ala. 82; *post*, Chap. XXI.

3. Bank of Circleville v. Remick, 15 Ohio, 222.

4. Jones v. Bank of Tennessee, 8 B. Mon. 122.

CHAPTER III.

HOW THE BODY CORPORATE IS CONSTITUTED; AND OF ITS NAME, PLACE, MODE OF ACTION, POWERS, ETC.

Unless excluded by statute, any person who has the capacity to contract, may be a corporation, and if a statute prescribes that a certain number of persons may organize a corporation, the prescribed number of *bona fide* corporators is necessary.[1]

A corporation is usually composed of natural persons merely in their natural capacity; but it may also be composed of persons in their political capacity of members of other corporations.[2] Thus, by a charter of Edward VI., the mayor, citizens, and commonalty of London, are appointed Governors of Christ's Hospital of Bridwell, and incorporated by the name of the Governors of the possessions, revenues, and goods of the Hospital of Edward VI., King of England, of Christ Bridwell.[3] So the government of the country may be, and often is, one of the members of a private corporation; as in the case of the Bank of the United States, the Planters Bank of Georgia,[4] and the Bank of the State of South Carolina.[5]

So, also, several distinct and independent corporations may form the component parts of one general corporate body. For instance, in Shrewsbury, in England, there are several distinct and independent companies of carpenters, bricklayers, &c., and these all united form one great corporation under the name of the "Company of Carpenters, Bricklayers, &c., of Shrewsbury." There are some towns, also, in England, in which there are several incorporated companies of trades, which have so far a connection with the general corporation of the town, that no man can be a freeman of the town at large, and consequently a member of the general corporation, without being previously a freeman of some one of these companies; and of this description is the corporation of the city of London. The general corporate bodies of the English Universities are constituted nearly in the same manner; for every member of the general corporation must be a member of some one of the colleges or halls within the University.[6]

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1. Clark Corp. 57.
2. Clark Corp. 58.
3. 10 Co. 31b.
4. 9 Wheat. 907.
5. 3 McCord, 377.
6. 1 Kyd, 36.

Many aggregate corporations are composed of distinct parts, which are called integral parts, without any one of which the corporation would not be complete, although none of them are by themselves a corporation. Thus, where a corporation consists of a mayor, aldermen, and commonalty, the mayor, the aldermen, and the commonalty are three integral parts; but neither of them has any corporate capacity, distinct from the other two, and, therefore, the mayor cannot, in his political character of mayor, take in succession any thing as a sole corporation; nor the aldermen, as a select body, take any thing to them and their successors as an aggregate corporation. In many aggregate corporations there is one particular person, who is called the head, and who forms one of the integral parts; such is the mayor of a city corporation, and the chancellor in the general corporations of the English Universities.[7] The corporation of St. Mary's Church, in the city of Philadelphia, consisting of three *clerical* and eight *lay* members, was considered by the court to be a corporation, composed of two distinct classes or integral parts.[8]

Every corporation must have a name,[9] by which it may be known as a grantor and grantee, and to sue and be sued, and do all legal acts. Such name is the very being of its constitution, the "knot of its combination," without which it could not perform its corporate functions.[1] The name of incorporation, says Sir Edward Coke, is a proper name, or name of baptism; and, therefore, when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king baptizes the corporation.[2] But though the name of a corporate body is com-

7. 1 Kyd, 36. But there may be a corporation aggregate of many persons, capable, without a head, as a chapter without a dean, or a commonalty without a mayor; thus, the collegiate church of Southwell, in Nottinghamshire, consists of prebendaries only, without a dean; and the governors of Sutton's Hospital, commonly called the Charter House, have no president or superior, but are all of equal authority; and at first the greater number of corporations were without a head. Ibid. 37.

8. St. Mary's Church, 7 S. & R. 517.

9. Com. Dig. tit. *Franchise* (F. 9), 10 R. 29b.

1. Smith, Mer. Law, 133; Clark Corp. 63.

2. 10 Rep. 28.

pared to the Christian name of a natural person, yet the comparison is not, in all respects, perfectly correct. A Christian name consists, in general, but of a single word, as Oliver, or Robert, in which the alteration or omission of a single letter *may* make a material alteration in the name. In all grants *by* or *to* a corporation, though expressed to show that there is such an artificial being, and to distinguish it from all others, the body is well named, though there is a variation in words and syllables.[3] The name of a corporation frequently consists of several words, and an omission or alteration of some of them is not material.[4] The Supreme Court of New Hampshire say, that there is this difference between the alteration of a letter, or the transposition of a word, between naming a natural person and naming a corporate body: It makes entirely another name of the person in the one case, while the name of a corporation frequently consists of several *descriptive* words, and the transposition of them, or an interpolation, or omission of some of them, may make no essential difference in their sense.[5] The rule has been stated to be, that in grants and conveyances the name must be the same, in *substance*, as the true name; but need not be the same in words and syllables.[6]

Though partnerships may be at liberty to change their name or style, yet, after a company has been *incorporated* by a name set forth in the act of incorporation, such incorporated company has **not the right** nor **the power to change its name.** The legislature may, however, change the name of a corporation, but if its identity appear, a mere change does not affect third persons.[7]

A private corporation, whose charter has been granted by one State, cannot hold meetings, pass votes, and exercise

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3. 10 Rep. 135. See Bac. Ab. tit. *Corp.*

4. See 1 Kyd, 227.

5. Newport Mechanics Man. Co. v. Spirbird, 10 N. H. 123.

6. Per Parke, J., in Rex v. Haughley, 4 B. & Ad 655. Ordinarily the corporators may select any name they choose, unless, as is sometimes the case, there are statutory restrictions. Clark Corp. 63.

7. Rosenthal v. Madison P. R. Co., 10 Ind. 359. In practice corporate names are not infrequently changed. See Clark Corp. 63.

powers in another State. It can have no legal existence out of the boundaries of the sovereignty by which it is created, must dwell in the place of its creation, and cannot migrate to another sovereignty.[8] An authority given in a charter, in general terms, to certain persons to call the first meeting of the corporators, does not authorize them to call such meeting at any place without the limits of the State.[9]

A private trading corporation must be held to reside in the town where its principal office is, as a local inhabitant. Its residence depends not on the habitation of the stockholders in interest, but on the official exhibition of legal and local existence.[1]

A corporation is a subject of the government of the country in which it is created, although the members composing it may be foreigners.

The Common Law annexes to a corporation when created, certain incidents and attributes; and, both by the laws of England and the United States, there are several powers and capacities which tacitly, and without any express provision, are considered inseparable from every corporation. Kyd enumerates five of these as necessarily and inseparably belonging to *every* corporation. 1. **To have perpetual succession**, and hence, all *aggregate* corporations have a power, necessarily implied of admitting members in the room of such as are removed by death or otherwise. 2. **To sue and be sued, implead and be impleaded, grant and receive by its corporate name, and do all other acts as natural persons may.** 3. **To purchase lands and hold them** for the benefit of themselves and their successors. 4. **To have a common seal**; and, 5. **To make by-laws**, which are considered as

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8. Clark Corp. 66 *et seq.*; Bank of Augusta v. Earle, 13 Pet. 519; Miller v. Ewer, 27 Me. 509; Farnum v. Blackstone Canal Co., 1 Sumner, 47; Runyan v. Coster, 14 Pet. 129; Day v. Newark India Rubber Co., 1 Blatchf. C. C. 628

9. Miller v. Ewer, 27 Me. 509, which explains the apparently contradictory decision in Copp v. Lamb, 3 Fairf. 314. See Middle Bridge Corp. v. Marks, 26 Me. 326.

1. See Clark Corp. 66 *et seq.*; Railroad Co. v. Stetson, 2 How. 497; Connecticut R. Co. v. Cooper, 30 Vt. 476; Thorn v. Central R. Co., 2 Dutch, 121; Taylor v. Crowland Gas Co., 11 Exch. 1; 29 Eng. L. & Eq. 516.

private statutes for the government of the corporate body.[2] To these ordinary incidents of an incorporated company, Kent, in his commentaries, has added, as a sixth,—**the power of amotion or removal of members**; and in the power to purchase and hold property, he includes chattels as well as land.[3] And, he adds, that "some of these powers are to be taken, in many instances, with much modification and restriction; and the essence of a corporation consists only of a capacity to have perpetual succession, under a special denomination, and an artificial form, and to take and grant property, contract obligations, and sue and be sued by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities."[4] Each of the above-mentioned incidental powers and capacities, of course, may be regulated and limited by the act or charter of incorporation; and when they are not in any degree restricted or curtailed, they can only be exercised to effect the purposes for which they were conferred by the government.

The mode, by which corporations manifest their assent, make contracts, &c., is by their common seal, or, as it is sometimes expressed, **by deed**; or, by **a vote of the company**; or by the contracts or agreements of their authorized *agents*. But though such are the usual modes in which corporations act, and though, as a general rule, the doings and declarations of individual members, not sanctioned by the body, are not binding upon it, yet the rules of law have, by modern decisions, been made so flexible, as to allow inferences to be drawn from corporate acts which tend to prove a contract or promise, as in cases of natural persons.[5]

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2. 1 Kyd, 69.
3. 2 Kent, Com. 224.
4. Ibid.
5. See *post*, Common Seal, Contracts, and Agents.

CHAPTER IV.

OF THE ADMISSION AND ELECTION OF MEMBERS AND OFFICERS.

In respect to the power of admitting members, reference must often be had to the provisions and spirit of the charter; and when the charter is silent, to the rules of the Common Law, and to the particular nature and purpose of the corporation. In certain corporations (such, for example, as religious and literary) the number of members is often limited by charter; and whenever there is a vacancy, it is usually filled by a *vote* of the company.[1]

As regards trading and joint-stock corporations, no vote of admission is requisite; for any person who owns stock therein, either by original subscription, or by conveyance, is, in general, entitled to, and cannot be refused, the rights and privileges of a member.[2] In a mutual insurance company, it is well known, that a person may become a member by insuring his property, paying the premium and deposit money, and rendering himself liable to be assessed according to the rules of the corporation.[3] In the important case of Overseers of the Poor v. Sears, Shaw, C. J., in delivering the opinion of the court, says: "In all bridge, railroad, and turnpike companies, in all banks, insurance companies, manufacturing companies, and, generally, in corporations having a capital stock, and looking to profits, membership is constituted by a transfer of shares, according to the by-laws, without any election on the part of the corporation itself."[4] But it seems, that, although the party taking a conveyance of shares is entitled to membership, yet an election, as for directors, his right to vote must be determined by the transfer-book of the company, the inspectors not being authorized to look beyond it;[5] he may have all the

1. Clark Corp. 251.

2. Clark Corp. 251; Gilbert v. Manchester Iron Co., 11 Wend. 627; Sargent v. Franklin Ins. Co., 8 Pick. 90.

3. Sullivan v. Massachusetts Ins. Co., 2 Mass. 315.

4. 22 Pick. 122. And see Philadelphia Savings Institution, 1 Whart. 461; Long Island Railroad Co., 19 Wend. 37.

5. Long Island Railroad Co., 19 Wend. 37; *Ex parte* Holmes, 5 Cowen, 426. And see *Ex parte* Desdoity, 1 Wend. 98.

rights. In general, a party can not otherwise become a member of a joint-stock trading corporate body, than by himself subscribing to the undertaking, or stepping into the place of an original subscriber; and it is the peculiarity of what is thus made the title of admission to the company, and the provision it affords for the succession of fresh members, that constitutes one of the main features of these companies, and mainly distinguishes them from ordinary corporations.[6] The power of admitting new members, being incident, as has been before observed, to every corporation aggregate, it is not necessary that such power should be expressly conferred by the charter.

As to the power of electing officers, if the power is not expressly lodged in other hands (as, for instance, in a body of directors), it must be exercised by the company at large.[7]

The power may, by the charter or by a general statute, be taken from the body at large, and reposed in a body of directors, or any other select body.[8] In these, as in all other cases, the terms of the charter or act of incorporation, are overruling.

A *particular day* is generally appointed by the constitution of a corporation for the election of the principal officers. This is usually styled the "charter day," and is usually fixed with so much certainty that no doubt can arise.[9]

If there is no form prescribed for the election, **every candidate must be proposed singly**, whether the election is by the whole body or by a definite class; and if the names of more than one be set down in a list, and the election proposed to be made of the whole by a single vote, such election is altogether void, although the names have been repeatedly read over, and an offer made to strike out any to which an objection should be made, and notwithstanding the election

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6. Clark Corp. 251; Mann v. Currie, 2 Barb. Ch. 294.

7. See State v. Ancker, 2 Rich. 244; Commonwealth v. Bousall, 3 Whart. 560.

8. 1 Rol. Abr. 513, 1, 50; Philips v. Bury, Parl. Ca. 45; Willcock on Mun. Corpor. 201; Commonwealth v. Gill, 4 Whart. 228. See, generally, Clark Corp. 251 *et seq.*

9. People v. Runkel, 9 Johns. 147. And see Hicks v. Town of Launceston, 1 Roll. Abr. 512; Foot v. Mayor of Truro, Stra. 625. See, generally, as to the election of officers, etc., Clark Corp. 469 *et seq.*

was by the unanimous consent of the entire body. For, it may be presumed that, instead of using his judgment as to the propriety of admitting any individual (which would be the case where they are separately proposed), each elector, desirous to obtain the admission of some one in particular, may compromise his opinion as to the others, and thus, persons may be introduced who would otherwise have been rejected.[1]

The right of voting at an election of an incorporated company by proxy is not a general right, and the party who claims it, must show a special authority for that purpose. The only case in which it is allowable, at the Common Law, is by the peers of England, and that is said to be in virtue of a special permission of the king.[2] The mere circumstance that improper votes are received at an election, will not vitiate it. The fact should be affirmatively shown, that a sufficient number of improper votes were received for the successful ticket, to reduce it to a minority, if they had been rejected; or, otherwise, the election must stand.[3]

CHAPTER V.

OF THE POWER TO TAKE, HOLD, TRANSMIT IN SUCCESSION, AND ALIENATE PROPERTY.

To enable it to answer the purposes of its creation,[1] every corporation aggregate has, incidentally, at common law, a right to take, hold, and transmit in succession, property, real and personal, to an unlimited extent or amount.[2] Ac-

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1. Rex v. Monday, Cowp. 539; Willcock on Mun. Corp. 215. See, generally, as to meetings and elections, Clark Corp. 448, 469.

2. Phillips v. Wickham, 1 Paige, 590; Clark Corp. 463.

3. Rex v. Jefferson, 2 Nev. & M. 437; Rex v. Winchester, 2 Nev. & P. 274.

1. It cannot acquire or hold property for a purpose foreign to the objects for which it was created. Clark Corp. 119. Consult the statutes.

2. Littleton, 49 112, 114; Co. Litt. 44a, 300b; 1 Sid. 161w; 10 Co. 30b; 1 Kyd on Corp. 76, 78, 104; Com. Dig. tit. Franchise, F. 11, 15, 16, 17; Dy. 48a; 4 Co. 65a; 1 Bl. Com. 478; 2 Kent, Com. 227; M'Cartee v. Orph. As. Soc., 9 Cowen, 437; Reynolds v.

cordingly, as the incident supposes the principal, it has been held that a grant of lands from the covereign authority to the inhabitants of a county, town, or hundred, rendering rent, would create them a corporation for that single intent, or confer upon them a capacity to take and hold the lands in a corporate character, without saying to them and their successors.[3]

The English statutes of mortmain have been held by the Supreme Court of Pennsylvania to be the law of that State, so far as applicable to its political condition; and "all conveyances by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void,[4] unless sanctioned by charter or act of assembly."[5] They are, however, understood to apply, in that State, only so far as they prohibit dedications of property to superstitious uses or grants to corporations without a statutory license.[6] "In other States," says Kent, "it is understood that the statutes of mortmain have not been reenacted or practiced upon."[7] And in the absence of statutory prohibitions a corporation may take and hold property real or personal, by purchase, gift, devise or bequest; but not for a purpose foreign to the objects for which it was created.[8] If, however, a corporation be forbidden, by its charter, to *purchase* or *take* lands, a deed made to it would be void, as its capacity may be determined from the instrument which gives it existence.[9]

A corporation may take a mortgage upon land by way of

Stark County, 5 Ohio, 205; Lathrop v. Comm. Bank of Scioto, 8 Dana, 119; Overseers of Poor v. Sears, 22 Pick. 122; Clark Corp. 119.

3. Dyer, 100a, pl. 70, cited as good law by Lord Kenyon, 2 T. R. 672; 2 Kent, Com. 225; North Hempstead v. Hempstead, 2 Wend. 109; Stebbins v. Jennings, 10 Pick. 188; Soc. for Prop. Gospel v. Town of Pawlet, 4 Pet. 480.

4. See, however, Runyan v. Coster, 14 Pet. 122.

5. 3 Binney, App. p. 626.

6. Methodist Church v. Remington, 1 Watts, 218.

7. 2 Kent, Com. 229; M'Cartee v. Orp. As. Soc., 9 Cowen, 452; Lathrop v. Com. Bank of Scioto, 8 Dana, 119; Clark Corp. 120 and cases cited.

8. Clark Corp. 119 and cases cited.

9. Leazure v. Hillegas, 7 S. & R. 319, per Tilghman, C. J.; Baird v. Bank of Washington, 11 S. & R. 418; Goundie v. Northampton W. Co., 7 Barr, 239, 240; People v. Munroe, 5 Denio, 401; McIndoe v. St. Louis, 10 Mo. 576

security for loans, made in the regular course of its lawful business, or in satisfaction of debts previously contracted in its dealings. Such acts are generally provided for in charters incorporating a certain class of corporations, such as banks, insurance companies, and the like; and, without such special authority, it would seem to be implied in the reason and spirit of the grant, if the debt was *bona fide* created in the regular course of business.[1]

A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law and by force of law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence.[2] But although it may live and have its being in that State only, yet it does not follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts as those it seeks to enforce. Yet, as in case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the State of its creation, is acknowledged and recognized by the State or nation where the dealing takes place, and that it is permitted by the laws of that place, to exercise the powers with which it is endowed.[3] Thus, a steamboat company incorporated in one State may take a lease of an office, as a place of business, in another State.[4]

Every power, however, which a corporation exercises in another State, depends for its validity upon the laws of

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1. Clark Corp. 122; Silver Lake Bank v. North, 4 Johns. Ch. 370; Baird v. Bank of Washington, 11 S. & R. 411; People v. Utica Ins. Co., 15 Johns. 358; Susquehannah Bridge Co. v. General Ins. Co., 3 Md. Ch. Dec. 418; The Banks v. Poitiaux, 3 Rand. Va. 136; Thomaston Bank v. Stimpson, 21 Me. 195; Lagou v. Badollet, 1 Blackf. 418, 419; 2 Kent, Com. 282, 3d ed.

2. Clark Corp. 66 *et seq.*

3. Commercial Bank of Vicksburgh v. Slocomb, 14 Pet. 60; Irvine v. Lowry, 14 Pet. 293. And see Bank of Augusta v. Earle, 13 Pet. 584.

4. Steamboat Co. v. McCutcheon, 13 Penn. State, 133.

sovereignty in which it is exercised; and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty, unless a case should be presented in which a right claimed by the corporation should appear to be secured by the Constitution of the United States.[5]

"**A corporation having power to take and hold property has the capacity to take and hold the same in trust,** and to execute the trust, if it be not repugnant to the purpose for which it was created. In the latter case the trust, if otherwise good, is not void, but a court of equity will appoint a new trustee to execute it."[6]

Corporations aggregate may, like natural persons, take lands, &c., by every species of conveyance by deed known to the law. In grants of lands to these bodies, the word "*successors*," though usually inserted, is not necessary to convey a fee-simple; for, admitting that such a simple grant be strictly only an estate for life, yet, as the corporation, unless of limited duration, never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one.[7] The same presumptions are raised in favor of a corporation as of a natural person, and its assent to, and acceptance of grants and deeds beneficial to it may be implied, as in case of an individual.[8]

The common-law right of taking personal property by bequest has always been enjoyed by corporations equally with individuals,[9] and a bequest to a corporation of its own stock, is as valid as a bequest of any thing else.[1]

Corporations aggregate have at common law an incidental

5. Ibid.

6. Clark Corp. 123, and notes where the cases are collected.

7. 2 Bl. Com. 109; 1 Kyd on Corp. 74, 104, 105; Co. Lit. 9b, 94b; Butler's and Harg. notes; Union Canal Co. v. Young, 1 Whart. 425; Overseers of the Poor v. Sears, 22 Pick. 122.

8. Bank of U. S. v. Dandridge, 12 Wheat. 64; Charles River Bridge v. Warren Bridge, 7 Pick. 344; Smith v. Bank of Scotland, 1 Dow, P. C 272.

9. 2 Atk. R. 37; 2 Bro. 58; Phillips Academy v. King, 12 Mass. 546; In the Matter of Howe, 1 Paige, Ch. 214; M'Cartee v. Orphan Asylum Society, 9 Cowen, 437.

1. Rivanna Nav. Co. v. Dawson, 3 Gratt. 19.

right to aliene or dispose of their lands and chattels, unless specially restrained by their charters or by statute.[2] Independent of positive law, all corporations have the absolute *jus disponendi*[3] neither limited as to objects, nor circumscribed as to quantity.[4] A corporation authorized to dispose of its property may in general dispose of any interest in the same, except in its franchise, it may deem expedient, having the same power in this respect as an individual.[5] Thus it may lease, grant in fee, in tail, or for term of life,[6] mortgage,[7] and though insolvent, assign its property in trust for the payment of its debts,[8] defeating by preferences, where the law allows it, even the priority of the State,[9] and where there is no actual fraud, preferring, it would seem, the debts of its own stockholders.[1] The assignment cannot indeed, without statutory authority, convey the franchise, which is not in its nature assignable, but the receipts and profits may be transferred by it to assignees, who would manage the business of the corporation merely as its agents.[2] **In general, corporations must take and convey their lands and other property, in the same manner as individuals**; the laws relating to the transfer of property being equally applicable

2. Co. Lit. 44a, 300b; 1 Sid. 161, note at the end of the case. The case of Sutton's Hospital, 10 Co. 30b; 1 Kyd on Corp. 108; Com. Dig. tit. Franchise F. 11, 18; 2 Kent, Com. 280; Clark Corp. 124.

3. Rights of disposing.

4. 2 Kent, Com. 280; Mayor of Colchester v. Lowten, 1 Ves. & B. 226, 237, 240, 244; Binney's case, 2 Bland, Ch. 142.

5. Reynolds v. Stark's County, 5 Ohio, 205.

6. Co. Lit. 44a, 300, 301, 325b, 341b, 342a, 346a, b; Plowd. 199; Dyer, 40, pl. 1, 97, pl. 45; Godbolt, 211; 1 Kyd on Corp. 108, 109, 110, 114, 115, 116.

7. Jackson v. Brown, 5 Wend. 590; Gordon v. Preston, 1 Watts, 385; Collins v. Central Bank, 1 Kelly, 455.

8. Clark Corp. 124; State v. Bank of Maryland, 6 Gill & J. 205; Warner v. Mower, 11 Vt. 385; Bank Commissioners v. Bank of Brest, Harring. Mich. Ch. 106; Flint v. Clinton Company, 12 N. H. 430; Arthur v. Commercial Bank of Vicksburgh, 9 Smedes & M. 394; Sargent v. Webster, 13 Met. 497; Catline v. Eagle Bank, 6 Conn. 233; Hopkins v. Gallatin T. Co., 4 Humph. 403; Dana v. Bank of U. S., 5 Watts & S. 247; Lennox v. Roberts, 2 Wheat. 373.

9. State v. Bank of Maryland, 9 Gill & J. 205; Town v. Bank of River Raisin, 2 Doug. Mich. 530. See, however, Opinion of Chan. Buckner, in Robins v. Embry, 1 Smedes & M. Ch. 258, 265.

1. Whitwell v. Warner, 20 Vt. 444, 445.

2. Clark Corp. 124.

to both. In all statutes of this character, corporations, unless excepted, are included in the word "persons," and as such may transfer or *enter* lands.[3]

If any portion of the members of a corporation secede, and are even erected into a new corporation, the corporate property will not be transferred or distributed in consequence of the separation, but will remain with the old corporation, unless indeed there be an agreement made for the partition of it.[4]

At common law, upon the dissolution, or civil death of a corporation, all its real estate remaining unsold, reverts back to the original grantor or his heirs;[5] for, says Coke, "in case of a body politique or incorporate, the fee-simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift or grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth."[6] The grant is indeed only during the life of the corporation, which may endure forever; but when the life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of any other grant for life.[7]

This rule by its terms applies only to such estate as remains in the corporation at the moment of its dissolution, and not to such as by the act of the corporation or the act of the law has been previously alienated.[8]

Likewise all the debts due to it from it were extinguished.

The consequences of dissolution upon the property of a corporation **were usually averted by some provision in the charter,** or by statutes general or special;[1] and now these common-law rules as respects private business corporations have become obsolete.[2]

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3. State v. Nashville University, 4 Humph. 157.

4. Dartmouth College v. Woodward, 4 Wheat. 518; Brown v. Porter, 10 Mass. 93; North Hempstead v. Hempstead, 2 Wend. 135, per Savage, Ch. J.

5. Co. Lit. 13b; Edmunds v. Brown, 1 Lev. 237; Rex v. Passmore, 3 T. R. 199, 1 Bl. Com. 484 (Vol. 1, this series); Hooker v. Utica Turnp. Company, 12 Wend. 371; 2 Kent Com. 307; Folger v. Chase, 18 Pick. 66; Fox v. Horah, 1 Ired. Eq. 358; Clark Corp. 121, 247 (Vol. 1, this series).

6. Co. Lit. 13b.

7. Bl. Com. 484.

8. State v. Rives, 5 Ired. 305, 309; Nicoll v. N. Y. R. Co., 12 Barb. 460.

9. Clark Corp. 246 *et seq.*

1. 2 Kent, Com. 307, 308; McLaren v. Pennington, 1 Paige, 111. Consult the statutes.

2. Clark Corp. 248.

CHAPTER VI.

OF PROPRIETORS OF COMMON AND UNDIVIDED LANDS.[1]

When our ancestors first came to America, it was usual in some of the New England States, for the legislatures to grant a township of land to a certain number of proprietors, as grantees in fee, to hold as tenants in common; and a great proportion of the lands of Massachusetts and Plymouth colonies were originally granted by the colonial legislatures in this way.[2] Much larger tracts in Massachusetts under grants from the Council at Plymouth, in England, from the General Courts of the colonies of Massachusetts and Plymouth, and from the Indians, were claimed by proprietors; the Kennebec proprietors claiming about three millions of acres; the Pejepscot proprietors about as many more; the Waldo proprietors about a million of acres; the Pemaquid proprietors about ninety thousand acres; and upon settlement of rights and boundaries with the State, these proprietors retained nearly one-half of what they thus claimed and held.[3] Other large tracts were also held and claimed under Indian titles recognized by the legislatures.[4] In Rhode Island, which was originally settled by persons persecuted from other colonies, and who had at first no charter of government, the proprietors acquired their lands wholly by purchases from the Indians, subsequently confirmed by the General Assembly organized under the charter of Charles II.[5] Thus, in almost every town in New England, there was a body of proprietors, distinguished from those inhabitants who had no interests in the grants and purchases referred to. As, in early times, the lands were of little money value, this latter class of inhabitants formed a very insignificant number; so that a town and proprietors' meeting would be composed of nearly the same individuals. Hence, it is by no means uncommon, in the earlier

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1. To most of our readers this chapter is of merely historical interest. For details see unabridged edition (8th), Ch. 6.

2. 2 Dane, Abr. 698.

3. 4 Dane, Abr. 70; Sullivan on Land Titles, 39, 40, 44 to 48.

4. Sullivan on Land Titles, 40 to 46. The letter of Governor Winslow, of the Plymouth Colony, of the 1st of May, 1676, states, that before King Philip's war, the English did not possess one foot of land in that colony, but what was fairly obtained, by honest purchase, from the Indian proprietors, with the knowledge and allowance of the General Court. Hazard's Collection of State Papers, vol. 2, p. 531 to 534; Holmes, Annals, vol. 1, p. 383; 3 Kent. Com. 391.

5. See Preamble and Act of 1682; R. Island Laws, Dig. 1730, p. 30, 31. In speaking of Rhode Island, in this connection, we exclude those portions of the State over which the Massachusetts and Plymouth Colonies, and when united, the province of Massachusetts Bay, once exercised jurisdiction.

records, to find the doings of the towns and proprietors confounded; the same clerk usually acting for both, and attributing to the one body the appropriate transactions of the other.[6] It was early found that the proprietors, in many cases, were too numerous and dispersed to manage their lands as individuals; since without incorporation, they could never, as a body, legally act even by majorities, so as to bind their dissenting associates; nor make a lease or sale of their lands, without the concurrence of every proprietor in the execution of the deed.[7] Accordingly, in the old digests of all the New England colonies, acts are found prescribing the mode in which their meetings shall be called, and empowering them to choose officers,—pass orders relative to the management, division, and disposal of their common lands,—and in some of the colonies, to assess and collect taxes from their members; in short, communicating to them all the incidents of a corporation aggregate, without giving them that name.[8]

By the acts before referred to, proprietors' meetings were called by warrant or order, issued at the request of some, or a specified number of the proprietors, by a magistrate, as a justice of the peace; the warrant, being required to set forth the occasion of the meeting. When met, the proprietors were also empowered to choose a clerk, surveyors, and other officers, who, in some of the colonies, were required to be sworn. They could not legally act upon the business of the propriety, unless at a meeting warned according to the statute enabling them to assemble in a corporate character.[9] But, though the vote of proprietors appointing an agent for a special purpose may not, for such a cause, be legal when passed; yet, if the proprietors acquiesce in the appointment receive the benefit of his transactions, knowing that he acted for them, and take no measures to show their dissent to his proceedings, they so far ratify his

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6. 2 Dane, Abr. 698. This confusion is found in the early records of Providence, R. I.; the records of both town and proprietors being kept in the same book until 1717-18.

7. In Rhode Island, and not improbably in some of the other States, before any act was passed enabling them so to do, and in fact whilst the settlements themselves were acting under a voluntary compact of government merely, the proprietors were accustomed to assemble and pass votes and orders relative to their common property, in the same manner as if incorporated; admitting members into the propriety, upon payment of a certain sum towards the common stock, by mere vote; and in the same simple way, from time to time, dividing their lands amongst those entitled, according to their rights.

8. 4 Dane, Abr. 70, 71, 72, and Sullivan on Land Titles, 122, 123, for Mass. Acts, being Acts of 1636, 1692, 1712, 1735, 1741, 1753, 1783. Laws of the Colony of New Plymouth, 197, 198, 223; Inhab. of Springfield v. Miller, 12 Mass. 415; Thorndike v. Barrett, 3 Greenl. 380; Coburn v. Ellenwood, 4 N. H. 99; Woodbridge v. Addison, 6 Vt. 204, 206; Stiles v. Curtis, 4 Day, 328; Laws, R. I. Dig. 1730, p. 30, 31.

9. Woodbridge v. Addison, 6 Vt. 204, 206.

doings, that they will be as binding upon them, as if he had been legally appointed.[1]

Copies of ancient proprietary grants are admissible in evidence, without proof that the meetings at which they were made, were legally assembled.[2] If the records of a proprietors' meeting state that it was legally warned and held, this has been deemed *prima facie* evidence of the fact,[3] and that the articles of business acted upon at such meeting were inserted in the warrant.[4]

The practice of making partition of their lands amongst the proprietors, by vote merely, prevailed in all the proprieties; an immense amount of property eventually depended upon the validity of these proceedings, and they have always been sustained by the courts of every one of the New England States.[5]

CHAPTER VII.

OF THE COMMON SEAL, AND OF THE DEEDS OF A CORPORATION.

In England, seals were introduced into common use by the Normans at the Conquest; [1] although they appear to have been known to the Saxons in the time of Edgar; and to have been used by Edward the Confessor, after his residence in Normandy.[2] In those early anl illiterate times, the Norman practice of sealing, any more than the ordinary Saxon practice of signing with, or appending to, the instrument, impressed on gold or lead, the sign of the cross, does not appear to have arisen from any notion of the peculiar solemnity of the seal, but from an incapacity on the part of him who would concur with the tenor of an instrument, to subscribe his name to it. Caedwalla, a Saxon king, honestly avows this reason at the end of one of his charters; "*propria manu, pro ignorantia literarum, signam sanctae expressi et subscripsi;*" [3] and it is evident from ancient French and Norman charters still extant, which, without being signed,

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1. Woodbridge v. Addison, 6 Vt. 204; Abbott v. Mills, 3 Vt. 528.

2. Pitts v. Temple, 2 Mass. 538, and Ibid.; Little v. Downing, 37 N. H. 355.

3. Stedman v. Putney, N. Chip. 11; Codman v. Winslow, 10 Mass. 150, 151.

4. Doe *d.* Britton v. Lawrence, 1 D. Chip. 103.

5. Adams v. Frothingham, 3 Mass. 360; Baker v. Fales, 16 Mass. 497; Folger v. Mitchell, 3 Pick. 396; Atkinson v. Bemis, 11 N. H. 44; Woodbridge v. Addison, 6 Vt. 206; Thorndike v. Richards, 13 Me. 430; Stiles v. Curtis, 4 Day, 328.

1. Mad. Form. Int. 27.

2. Co. Lit. 7a; Seld. Off. Chan. 3, dubitante; Mad. Form. Int. 27; 2 Bl. Com. 305.

3. 2 B. Com. 305, n. d. (Vol. 1). With my own hand on account of my ignorance of letters, I have expressed and subscribed the sign of the holy cross.

bear waxen seals with the name, cognizance, or device, of the makers impressed upon them.[4]

It is probable that a common seal became incident to every corporation, either from ignorance of the art of writing on the part of its officers or agents, or from the use of seals established among individuals, and originating in *their* ignorance. Blackstone, indeed, attributes this incident to the peculiar nature of a corporation aggregate. "For," says he, "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."[5]

This being the rule, it became incident to every corporation of this kind to have a common or corporate seal,[6] as the means necessary to enable it to appoint any special agent, except of the most inferior kind, or to make any contract whatever.[7] And not only is it incident to every corporation to have a common seal, without any clause in the charter or act of incorporation expressly empowering it to use one, but it may make or use what seal it will.[8]

At common law, the corporate seal cannot be impressed directly upon the paper, but must be upon wax, wafer, or some other tenacious substance, or the instrument to which it is attached will not operate as a sealed instrument.[9] But now in the United States at least, the old rule requiring the use of a seal is no longer in force; and unless the charter or some statute provides otherwise a corporation need use a seal only in those cases where a private individual would be required to use one.[1]

Corporations at this day are capable of making every

4. 2 Bl. Com. 306. (Vol. 1).

5. 1 Bl. Com. 475. (Vol. 1).

6. Davies, 44, 48; 1 Bl. Com. 475; 1 Kyd on Corporations, 268; 2 Kent, Com. 224.

7. The case of the Dean and Chapter of Fernes, Davies, 121.

8. The case of Sutton's Hospital, 10 Co. 30b; and see Goddard's case, 2 Co. R. 5, and Mill Dam Foundery v. Hovey, 21 Pick. 417; Porter v. Androscoggin R. Co., 37 Me. 349.

9. Bank of Rochester v. Gray, 2 Hill, 228, 229; Farmers Bank v. Haight, 3 Hill, 494, 495; Mitchell v. Union L. Ins. Co., 45 Me. 104.

1. Clark on Corporations, where the cases are collected in the notes.

species of deed.[2] It was once thought that a corporation could not stand seised to a use; and hence as a deed of bargain and sale merely passes the use, and the bargainor must stand seised of the land for a moment, that the Statute of Uses, if we may be allowed the expression, may have time to execute the use, it was thought that a corporation could not make a deed of bargain and sale.[3] In this country, however, the better opinion is, that any corporation may stand seised to a use, or trust, as it is called in modern times, for purposes not foreign to the object of its institution; and this is surely most conformable to principle, and convenient in practice.[4] If this be true, there can be no doubt of the power of a corporation to convey by deed of bargain and sale, as well as an individual.

In private corporations aggregate, for the sake of convenience, the whole management of their affairs is usually vested by charter in certain officers and boards; the body of the members having no voice except in their election.[5] When this is the case, the power of making deeds, like every other power, rests with *them;* and courts will not interfere upon a petition even of a majority of the *members,* to compel that body, contrary to their own judgment, to affix the common seal to any instrument.[6]

The corporate seal affixed to a contract or conveyance, does not render the instrument a corporate act, unless it is affixed by an officer or agent duly authorized.[7] It must be affixed by the officer to whose custody it is confided, or some person specially authorized; the officer or special agent acting in consequence of the directory vote of the body, or managing board of the corporation, as the case may be.[8] The

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2. Mobile R. Co. v. Talman, 15 Ala. 472; Clark Corp. 124.

3. Com. Dig. Bargain and Sale, B. 3.

4. 2 Kent, Com. 226; Clark on Corp. 123. See Chap. VIII.

5. Bank of U. S. v. Dandridge, 12 Wheat. 113, per Marshall, C. J.; Union T. Corp. v. Jenkins, 1 Caines, 381; Commonwealth v. St. Mary's Church, 6 S. & R. 508. See Chap. VIII.

6. Commonwealth v. St. Mary's Church, 6 S. & R. 508.

7. Jackson v. Campbell, 5 Wend. 572; Damon v. Granby, 2 Pick. 345, 353; Bank of Ireland v. Evan, 5 H. L. Cas. 389.

8. Derby Canal Co. v. Wilmot, 9 East, 360; Bank of U. S. v. Dandridge,

president and cashier of a bank cannot use the common seal without the authority of the board of directors.[9]

The common-law rule with regard to natural persons, that an agent, to bind his principal by deed, must be empowered by deed himself, cannot in the nature of things be applied to corporations aggregate. These beings of mere legal existence, and their *boards,* as such, are, literally speaking, incapable of *personal* act. They *direct* or *assent* by vote; but their most immediate mode of *action* must be by agents. If the principal, the corporation, or its representative, the board, can assent primarily by *vote* alone, to say that it could constitute an agent to make a deed only by deed, would be to say that it could constitute no such agent, whatever; for, after all, who could seal the power of an attorney, but one empowered by *vote?* [1] When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority.[2] The contrary must be shown by the objecting party.[3] The technical mode of executing the deed of a corporation is to conclude the instrument, which should be signed by some officer or agent in the name of the corporation, with, "In testimony whereof, the common seal of said corporation is hereunto affixed;" and then to affix the seal.[4] It is prudent to have witnesses to the sealing; for the common seal is not evidence of its own authenticity, but must be proved, not indeed necessarily by one who saw it affixed

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12 Wheat. 68, per Story, J.; Berks & Dauphin T. R. v. Myers, 6 S. & R. 12; Clarke v. Imperial Gas Co., 4 B. & Ad. 315, 1 Nev. & M. 206.

9. Hoyt v. Thompson, 1 Seld. 320.

1. Hopkins v. Gallatin T. Co., 4 Humph. 403; Beckwith v. Windsor Manuf. Co., 14 Conn. 594; Howe v. Keeler, 27 Conn. 538; Burr v. McDonald, 3 Gratt. 215.

2. Skin. 2; 1 Kyd on Corporations, 268; Adams v. His Creditors, 14 La. 455; Darwell v. Dickens, 4 Yerg. 7; Burrill v. Nahant Bank, 2 Met. 166; Commercial Bank v. Kortright, 22 Wend. 348; Lovett v. Steam Saw-Mill Ass., 6 Paige, 54.

3. Ibid. and case of St. Mary's Church 7 S. & R. 530, per Tilghman, C. J.; Colchester v. Lowten, 1 Ves. & B. 226; Lovett v. Steam Saw-Mill Association, 6 Paige, 54; Flint v. Clinton Company, 12 N. H. 434. But see Miller v. Ewer, 27 Me. 509.

4. Flint v. Clinton Company, 12 N. H. 433.

or adopted, but by one who, from the motto, devise, &c., knows it to be the seal of the corporation, as whose it is produced.[5] The signature of the agent of the corporation, executing the instrument in its behalf, however, being proved, the seal, though mere paper and wafer stamped with the common desk seal of a merchant, will be presumed to be intended as the seal of the corporation, until the presumption is rebutted by competent evidence.[6] A seal of a foreign corporation, as that of the City of London, cannot be admitted to be such seal without proof that it is the official seal it purports to be; nor can it be proved by comparison with a similar seal already given in evidence without objection.[7]

The deed of a natural person takes effect only by, and from, its delivery. This ceremony, however, is unnecessary to the complete execution of the deed of a corporation, since it is said to be perfected by the mere affixing of the common seal. Lord Hale, in a note to Coke Littleton, remarks, that, "if a dean and chapter seal a deed, it is their deed immediately."[8] This rule is to be taken with the important qualification, that, by the affixing of the seal, the complete execution of the deed was *intended;* "for it," adds Lord Hale to the above remark, "they (the dean and chapter) at the same time make a letter of attorney to deliver it, this is not their deed till delivery."[9] In the Derby Canal Company v. Wilmot,[1] it appearing that the order of the managing committee to the clerk, to affix the seal, was accompan-

5. Moises v. Thornton, 8 T. R. 303, 304; Peake, Law of Evidence, 48, n.; Starkie on Evidence, Part 2d, 300, n. 1; Jackson v. Pratt, 10 Johns. 381; Mann v. Pentz, 2 Sandf. Ch. 271, 272; Foster v. Shaw, 7 S. & R. 156. See Doe d. Woodmas v. Mason, 1 Esp. 53, where Lord Kenyon held, as an exception to the general rule, that the common seal *of the City of London* proved itself. See Moises v. Thornton, 8 T. R. 304, per Lord Kenyon.

6. Mill Dam Foundery v. Hovey, 21 Pick. 428, Putnam, J.; Flint v. Clinton Company, 12 N. H. 433, 434.

7. Chew v. Keck, 4 Rawle, 163.

8. Co. Lit. lib. 1, §§ 5, 36a, n. 222, Hargrave & Butler's ed.; and see Case of the Dean and Chapter of Fernes, Dav. 44; 2 Leon. 97; 1 Vent. 257; 1 Lev. 46; 1 Sid. 8; Carth. 260; 3 Keb. 307; 1 Kyd on Corp. 268; *contra*, 2 Leon. 98, Gawdy, J.

9. Co. Lit. lib. 1, §§ 5, 36a, n. 222, Hark. & Butler's ed.; and see Willis v. Jermin, Cro. E. 167; W. Jones, 170; Palm. 504.

1. 9 East, 360.

ied with a direction to retain the conveyance in his hands until accounts were adjusted with the purchaser, it was held by the Court of King's Bench, that, notwithstanding the affixing of the common seal, the deed was incomplete; Lord Ellenborough, as the organ of the court, observing, "that, in order to give it (the deed) effect, the affixing of the seal must be done with an intent to pass the estate; otherwise it operates no more than a feoffment would do without livery of seisin."

CHAPTER VIII.

OF THE MODE IN WHICH A CORPORATION MAY CONTRACT, AND WHAT CONTRACTS IT MAY MAKE.

In accordance with the notion that corporations aggregate could express their assent only by the common seals, **the ancient doctrine of the common law was, that they could bind themselves only by deeds, or special contracts.**

The present law upon this subject has been well summarized by Mr. Clark in his work on corporations (2nd ed. 1907), page 124 *et seg.*, as follows:

"**A corporation has no power to enter into any contract that is not expressly or impliedly authorized by its charter. But any contract that is reasonably necessary or proper for carrying out the powers expressly conferred is impliedly authorized.** Among the powers impliedly conferred upon every corporation in the absence of express restrictions in its charter [in the constitution or in the general laws of the land] are the following:

(a) A corporation has the implied power to purchase such real and personal property as its purposes may require; but it has no power to purchase property for a purpose foreign to the objects for which it was created.

(b) A corporation generally has the implied power to sell and convey or mortgage real or personal property owned by it; but a railroad company or other quasi-public corporation cannot dispose of or mortgage property

which is needed in order to carry on the business for which it was created, unless expressly authorized. Nor can a corporation transfer or mortgage its franchise without statutory authority.

(c) It has the power to borrow money whenever the nature of its business renders it proper or expedient.

(d) It has the power to execute a bond for any purpose for which it may contract a debt.

(e) In this country it has power to make or indorse promissory notes and to draw, indorse or accept bills of exchange, if it is a usual or proper means of accomplishing the objects for which it was created.

(f) Subject to certain exceptions it has no power to enter into a contract of suretyship or guaranty unless the power is expressly conferred. And it can not bind itself by an accommodation note or bill.

(g) It has no implied power to enter into a contract of partnership, but it may contract jointly with another.

(h) By the better opinion a corporation has no power, unless expressly authorized, to subscribe for or purchase stock in another corporation. But it may in good faith take and hold stock in another corporation to secure a loan previously made by it, on a debt due it, or in payment of such loan or debt.

(i) In most jurisdictions in this country [not in all] a corporation may, in the absence of express restrictions, purchase its own stock, provided the purchase be not to the injury of its creditors.

(j) A corporation has no power to consolidate with another corporation unless the power is expressly conferred upon it. The presumption is that the contracts of a corporation are within its powers, and the burden of showing the contrary rests upon the party who objects."[1]

As to the form of the contract, "it is now settled that except so far as there may be express restrictions in its charter or some statute, a corporation can contract by reso-

1. See, generally, Clark on Corp. pp. 124-160, where the cases are fully collected and considered in the notes.

lutions or agents, and without a seal, in any case where a natural person can contract without a seal. And like a natural person it may be liable *quasi ex contractu.*"[2]

A corporation may by use or reputation be known by several names as well as a natural person;[2a] and will be bound by obligations of any sort assumed by it in its adopted name, as that of a firm, or of an agent. It was early held, that the misnomer of a corporation in a grant, obligation, or other written contract, does not prevent a recovery thereon either by or against the corporation in its true name, provided its identity with that intended by the parties to the instrument be averred in pleading, and apparent in proof.[3]

1. It having once been established, that corporations might contract otherwise than by their corporate seals,— that they might make parol promises, either by vote, or through their authorized agents, **no reason could be found in technical principle or substantial justice, why** they should not **be subject and entitled to the same presumptions as natural persons.** Indeed, it seems early to have been settled that a charter may be presumed to have been given to persons who have long acted as a corporation; though the very case supposes that no other proof than the long-continued exercise of corporate powers could be adduced, of a charter, or of a vote of the corporators to accept it.[4] It had been held also, that the acceptance of a particular or amended charter by an existing corporation, or by corporators already in the exercise of corporate powers, may be inferred from the acts of corporate officers, or facts which demonstrate that it must have been accepted; and that it is not indispensable to show a written instrument or vote of acceptance on the corporation books.[5] From the same species

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2. Id. 154 and cases cited.

2a. Minot v. Curtis, 7 Mass. 444, per cur.; Medway Cotton Manuf. Co. v. Adams, 10 Mass. 360; Melledge v. Boston Icon Co., 5 Cush. 176, 177.

3. See Mayor and Burgesses of Lynne Regis, 10 Co. R. 125; Clark Corp. 63, and cases cited.

4. Bank of U. S. v. Dandridge, 12 Wheat. 71. See Chap. II.

5. Ibid., and The King v. Amery, 1 T. R. 575, 2 T. R. 515; Newling v. Francis, 3 T. R. 189. See Middlesex Husbandmen v. Davis, 3 Met. 133; Wetumpka R. Company v. Bingham, 5 Ala. 657.

of evidence, the enactment[6] and repeal[7] of by-laws have been inferred. In this country it has been settled by repeated decisions, that all duties imposed on corporations aggregate by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie.[8]

Not only **estoppels**, technically so called, but estoppels *in pais*, **operate both for and against corporations.**[9]

Banks, or indeed any other bodies corporate, may as well make contracts of bailment of every kind, as natural persons; provided it be done in the course of business permitted or contemplated by their charters. Incorporated stage-coach companies may be liable as common carriers; and banks sue every day as lenders, and are sued as depositaries, borrowers, &c. It is not necessary that the act of incorporation should give a bank particular power to receive deposits, to enable it so to do. It is sufficient that this is in the ordinary course of banking business; and such a corporation, by the mere grant of a charter for that species of business, is empowered to do it in all its branches, unless expressly restrained. It is not bound to receive on deposit the funds of every man who offers them, but may select its dealers, and the cashier is the proper officer to make the selection.[1] It is apparent that very numerous and important questions may arise, as to how far corporations are liable as bailees, for the loss of, or any injury to, the thing bailed, and how far for the neglects, frauds, embezzlements, and thefts of their servants, as cashiers of banks, &c. The solution of these must depend upon the general principles of the law of bailments, which apply equally to corpora-

6. Union Bank of Maryland v. Ridgely, 1 Harris & G. 413.

7. Attorney-General v. Middleton, 2 Ves. Sen. 328.

8. Salem Bank v. Gloucester Bank, 17 Mass. 1; Smith v. First Congregational Meeting-house in Lowell, 8 Pick. 178; Bank of Kentucky v. Wister, 2 Pet. 318; Kennedy v. Baltimore Insurance Co., 3 Harris & J. 367; Stone v. Congregational Society of Berkshire, 14 Vt. 86.

9. Selma R. Co. v. Tipton, 5 Ala. 808; Philadelphia R. Co. v. Howard, 13 How. 307, 335; Scaggs v. Baltimore R. Co., 10 Md. 268, 280.

1. Thatcher v. Bank of the State of New York, 5 Sandf. Ch. 121. See Clark Corp. 119, 131.

tions, as to natural persons.[2] The reasonable and established customs of banks enter into and make a part of contracts made with them, and must have due weight in expounding their contracts, when knowledge of the customs can in any way be brought home to those sought to be affected by them.[3] A custom of a bank not to correct mistakes in the receipt or payment of money, unless discovered before the person leaves the room, is, however, illegal and void.[4] A custom of a bank to pay only half of a half bank-note has also been held to be bad, as unsupported by law.[5] Usages of banks will not be judicially noticed, but must be proved, or must have been heretofore proved, and established by courts of justice, before they will be recognized and applied.[6] To give them the force of law, requires an acquiescence and notoriety, from which an inference may be drawn that they are known to the public, and especially to those who do business at the bank.[7]

The law applicable to agents for collection in general, applies equally to banks.

It is the well-settled doctrine of the present day, that **the same presumptions are applicable to a corporation as to a natural person.** There is no reason why its assent to, and acceptance of, grants and deeds beneficial to it should not be inferred from its acts, as well as that the same inference should be drawn from the acts of individuals. In The Bank of the United States v. Dandridge,[8] it was decided, that a bond with sureties given by the cashier of a bank for the faithful performance of his duties, and found in the possession of the bank, the cashier having acted in his office,

2. Foster v. Essex Bank, 17 Mass. 496, *et seq.*, and see Chap. IX.

3. Jones v. Fales, 4 Mass. 252; City Bank v. Cutter, 3 Pick. 414; Yeaton v. Bank of Alexandria, 5 Cranch, 52; Morgan v. Bank of North America, 8 S. & R. 73; Pearson v. Bank of Metropolis, 1 Pet. 93; Bank of Metropolis v. New England Bank, 1 How. 234; Bank of Columbia v. McGruder, 6 Harris & J. 180.

4. Gallatin v. Bradford, 1 Bibb, 209.

5. Allen v. State Bank, 1 Dev. & B. 3.

6. Planters Bank v. Farmers Bank, 8 Gill & J. 449.

7. Adams v. Otterback, 15 How. 545, per McLean, J.

8. 12 Wheat. 64; Dedham Bank v. Chickering, 3 Pick. 335.

might, as in case of natural persons, be presumed to be accepted by the bank, although no vote of acceptance by the directors could be found on the records of the corporation.

It needs no authority to establish, that if a general statute prescribe the mode or modes in which corporations must contract, a contract made in any other mode will not be binding upon the corporation or the party contracting with it, unless the statute, as it sometimes does, provides to the contrary.

Persons out of a State, as well as within it, are bound to take notice of public laws limiting the powers of corporations.[9] Neither is it necessary that *corporations eo nomine* should be embraced within the terms of an act, to subject them to its prohibitions, since it is well settled that the words *inhabitants, occupiers,* or *persons,* may include incorporated companies.[1]

A corporation, keeping within the scope of its general powers, may contract or bind itself to do any act *at any place;* and, wherever the engagement may be broken, it will be equally liable.[2]

CHAPTER IX.

OF AGENTS OF CORPORATIONS, THEIR MODE OF APPOINTMENT AND POWER.

In general, the only mode in which a corporation aggregate can act or contract is through the intervention of agents, either specially designated by the act of incorporation, or appointed and authorized by the corporation in pursuance of it.[1] It is an old rule of the common law, that such a corporation cannot levy a fine, acknowledge a deed,

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9. Root v. Goddard, 3 McLean, 102.

1. Inst. 703; Rex v. Gardner, Cowp. 79; Mott v. Hicks, 1 Cow. 513; City of St. Louis v. Rogers, 7 Mo. 19; State v. Nashville University, 4 Humph. 157; McIntire v. Preston, 5 Gilman, 48.

2. Bank of Utica v. Smedes, 3 Cowen, 684; M'Call v. Byram Man. Co., 6 Conn. 420.

1. Co. Lit. 66b.

or appear in a suit, except by attorney or agent,[2] and corporations, with power to sue and be sued, perform necessary services, incident to such business, by agents.[3]

The power to appoint officers and agents rests, like every other power, in the body of the corporators, unless some particular board or body, created or existing within the corporation, is legally vested with it; and courts cannot judicially notice that a particular board or body of the corporation is authorized by the charter and by-laws to appoint agents, where the evidence of the charter and by-laws is not introduced.[4]

Generally speaking, any persons may, by due appointment, be the agents of corporations, as well as of natural persons; and it is a well-established principle, that they even who are disqualified to act for themselves, as infants and feme coverts, may yet act as the agents of others.[5] A corporation may employ one of its own members as an agent to act as auctioneer at the sale of its pews, who may make the memorandum of sale, required under the Statute of Frauds to bind the purchaser.[6]

It is not unusual, however, for the charters of banking, insurance, and turnpike companies, to prescribe who, and who alone, shall be the agents of the company for particular purposes; and in such cases, the boards or persons specified, and they alone, for those purposes are, or can be, the agents of the corporation.[7]

Boards of directors, managers, &c., are agents of the corporation, only so far as authorized directly or impliedly by the charter; and the general authority given by the act incorporating a manufacturing corporation to the directors, to manage the stock, property, and affairs of the corporation, does not enable them to apply to the legislature for an enlargement of the corporate powers; and a legislative re-

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2. Com. Dig. Attorney, C. 2.

3. Planters Bank v. Andrews, 8 Port. Ala. 404.

4. Haven v. New Hampshire Asylum for the Insane, 13 N. H. 532.

5. Co. Lit. 52a; Emerson v. Blouden, 1 Esp. 142; Palethorp v. Furnace, 2 Esp. 511; Anderson v. Sanderson, 2 Stark N. P., 204. See *ante*, Agency.

6. Stoddert v. Port Tobacco Parish, 2 Gill & J. 227.

7. Washington T. Co. v. Crane, 8 S. & R. 521, 522.

solve passed upon such an application without authority from the company is void.[8]

Every private corporation has the inherent power to appoint officers and agents to supervise and manage its affairs. No particular formalities are necessary in the appointment of officers or agents, except such as may be prescribed by the charter or by-laws. It can make no difference whether their agents are appointed under the corporate seal, or by resolution, or vote; the appointment may be legally made in either mode, and that, too, although the agent be appointed to convey the real estate of the corporation, or whatver may be the purpose of the agency.[9] The ordinary and proper proof of the appointment and authority of an agent of a corporation is made by the production of the records or books of the corporation, containing the entry or resolution of appointment, the records being proved to be the records of the corporation;[1] and the secretary of the corporation is obviously the proper person to have possession of, and to prove, the books of the company.[2]

It is usually the case, that the charters or incorporating acts of corporations require that officers of great trust, as the cashiers of banks, or the clerks of insurance companies, should give bond with sureties for the faithful performance of their duties; and the question immediately arises, whether the giving of the bond with sureties, in such cases, is necessary to their complete appointment as corporate officers and agents. This must depend, in each particular case, upon whether the language of the charter or act of incorporation makes the giving of the bond a condition precedent to the complete appointment and due authorization of the agent, or whether it is in this respect merely directory.

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8. Marlborough Manuf. Co. v. Smith, 2 Conn. 579.

9. Clark Corp. 469, and cases cited. Randall v. Van Vechten, 19 Johns. 65; Lathrop v. Bank of Scioto, 8 Dana, 115; Savings Bank v. Davis, 8 Conn. 191; Bank of Columbia v. Patterson, 7 Cranch, 299; Andover T. Corp. v. Hay, 7 Mass. 602.

1. Owings v. Speed, 5 Wheat. 424; Thayer v. Middlesex Ins. Co., 10 Pick. 326; Clark v. Benton Manuf. Co., 15 Wend. 256; Methodist Chapel Corporation v. Herrick, 25 Me. 354; Haven v. New Hampshire Asylum, 12 N. H. 532.

2. Smith v. Natchez Steamboat Company, 1 How. Miss. 478.

And it seems, that where the act of incorporation, charter, or general statute, binding upon a corporation, empowers a board of directors, vested with power to appoint certain officers, to require security of them, that this is merely an affirmance of the common law; and though a by-law requires a certain species of security to be taken by the directors of certain officers on entering on the duties of their office, if a different species of security than that required by the by-law is taken by the directors, and any loss is sustained in consequence, this is a matter entirely between the directors and stockholders, for the failure of duty in the former; and in such a case there seems to have been no question of the due appointment of the officer.[3]

Though the charter or act of incorporation prescribe the mode in which the officers of a corporation aggregate shall be elected, and an election contrary to it would unquestionably be voidable, yet **if the officer has come in under color or right,** and not in open contempt of all right whatever, **he is an officer de facto,**—within his sphere, an agent of the corporation,—and his acts and contracts will be binding upon it.[4]

As the death of a natural person revokes all authority given to his agents, so must, so to speak, the death of a corporation, whether it takes place by limitation of law, or forfeiture of chartered rights; for there is then no master to serve.[5] The death, however, of the particular officers of a corporation, or of the members of a particular board, who may be vested with the power of appointing its agents, does not determine their agency, or revoke their power; for the principal, the corporation, still subsists.[6]

If the charter or act of incorporation prescribe the mode

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3. Bank of Northern Liberties v. Cresson, 12 S. & R. 306; U. S. v. Dandridge, 12 Wheat. 64, Marshall, C. J., *dissentiente*.

4. The King v. Lisle, Andrews, 163, 2 Stra. 1090; St. Luke's Church v. Mathews, 4 Des. 578, 586; Vernon Society v. Hills, 6 Cowen, 23; York County v. Small, 9 Watts & S. 320; Despatch Line of Packets v. Bellamy Manuf. Co., 12 N. H. 205; Burr v. McDonald, 3 Gratt. 215.

5. Union Bank of Maryland v. Ridgely, 1 Harris & G. 433, 434.

6. Bac. Abr. Authority, E. 14, H. VIII. 3; 11 H. VII. 19; Co. Lit. 52; 2 Roll. Abr. 12.

in which the officers or agents of a corporation must act or contract, to render their acts or contracts obligatory on the corporation, that mode must be pursued. The act of incorporation is an *enabling* act; it gives the body corporate all the power it possesses; it enables it to contract, and when it prescribes the mode of contracting, that mode must be observed, or the instrument no more creates a contract than if the body had never been incorporated. Persons dealing with a company of this sort should always bear in mind that it is a corporation, a body essentially different from an ordinary partnership or firm, for all purposes of contract; and should insist upon the contract being executed in the manner prescribed by charter or law.[7]

When the agent of a corporation would bind by contract he makes in its behalf the corporation only, his proper mode is, in the body of the contract, to name the corporation, as the contracting party, and to sign as its agent or officer; and this is the mode in which bank-bills and policies of insurance are ordinary executed.[8]

To bind a corporation by specialty, it is necessary that its corporate seal should be affixed to the instrument. The corporate seal is the only *organ* by which a body politic can oblige itself by *deed*; and though its agents affix their *private* seals to a contract binding upon it; yet these not being *seals* as regards the corporation, it is in such case bound only by simple contract.[9]

Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority.[9a] If the agent of a corporation make a contract beyond the limits of his authority, he is bound himself, in the same manner as the agent of a natural person would be.[1]

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7. Williams v. Chester R. Co. Exch., 5 Eng. L. & Eq. 503.

8. See, Agency, *ante*, and Negotiable Instruments, *post*.

9. Randall v. Van Vechten, 19 Johns. 65, per Platt, J.; Tippets v. Walker, 4 Mass. 597, per Parsons, C. J.; Bank of Columbia v. Patterson, 7 Cranch, 304, per Story, J.

9a. Essex T. Corp. v. Collins, 8 Mass. 299; Clark v. Washington, 12 Wheat. 40. See, *ante*, Agency.

1. Salem Bank v. Glocester Bank, 17 Mass. 29, 30; Stowe v. Wise, 7 Conn. 219; Underhill v. Gibson, 2 N. H. 352. See *ante*, Agency.

It is also well established, both in law and equity, that notice to an agent in the transactions for which he is employed, is notice to the principal; for otherwise, where notice is necessary, it might be avoided in every case by employing an agent. The rule applies equally to a corporation as to a natural person.[2]

The representations, declarations, and admissions of the agent of a corporation stand upon the same footing with those of the agent of an individual. To bind the principal, they must be within the scope of the authority confided to the agent, and must accompany the act or contract which he is authorized to do or make.[3]

As natural persons are liable for the wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment, so are corporations, upon the same grounds, in the same manner, and to the same extent.[4]

CHAPTER X.

OF THE BY-LAWS OF CORPORATIONS.

When a corporation is duly erected, the law tacitly annexes to it the power of making by-laws, or private statutes, for its government and support.[1] This power is included in the very act of incorporation;[2] for, as is quaintly observed by Blackstone, "as natural reason is given to the natural body for governing of it, so by-laws or statutes are a sort of political reason to govern the body politic."[3] The

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2. Lawrence v. Tucker, 7 Greenl. 195; Bank v. Whitehead, 10 Watts, 397; Boggs v. Lancaster Bank, 7 Watts & S. 336; McEwen v. Montgomery Co. Ins. Co., 5 Hill, 101. See, *ante*, Agency.

3. Fairfield County T. Co. v. Thorp, 13 Conn. 173; Stewart v. Huntington Bank, 11 S. & R. 267, 269; Hayward v. Pilgrim Society, 21 Pick. 270. See, *ante*, Agency, *post* Evidence.

4. Thompson v. Bell, 10 Exch. 10; Bargate v. Shortridge, 5 H. L. Cas. 297; Stevens v. Boston R., 1 Gray, 277. See, *ante*, Agency.

1. Norris v. Staps, Hob. 211; Bylaws, 3 Salk. 76; City of London v. Vanacre, 1 Ld. Raym. 496; Sutton's Hospital, 10 Co. R. 31a; Clark Corp. 440.

2. Norris v. Staps, Hob. 211; Clark Corp. id.

3. 1 Bl. Com. 476 (Vol. 1, this series).

power to make by-laws is, however, rarely left to implication; but is usually conferred by the express terms of the charter. And where the charter enables a company to make by-laws in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified, all others being excluded by implication.[4] But when so made, they are equally as binding on all their members and others acquainted with their method of doing business as any public law of the State.[5]

Unless by the charter, or some general statute to which the charter is made subject, or by immemorial usage, this power is delegated to particular officers or members of the corporation, like every other incidental power, it resides in the members of the corporation at large, to be exercised by them in the same manner in which the charter may direct them to exercise other powers or transact their general business; and if the charter contain no such direction, to be exercised according to the rules of the common law.[6] The power of making by-laws is, however, frequently reposed in a select body, as the directors; in which case a majority of that body, at least, is necessary, and is sufficient to constitute a quorum for the purpose of passing a by-law.[7]

If the charter prescribe the mode in which the by-laws shall be made and adopted, in order to their validity, that mode must be strictly pursued.[8] But where the charter is silent upon this point, since it is now well settled that a corporation aggregate may act without seal or writing, and is open to the same implications as an individual, it may adopt by-laws as well by its own acts and conduct, and the acts and conduct of its officers, as by an express vote, or an adoption manifested by writing.[9]

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4. Per Ld. Macclesfield, Ch. Child v. Hudson's Bay Co., 2 P. Wms. 207. See 2 Kyd on Corp. 102.

5. Cummings v. Webster, 43 Me. 192. See, generally, Clark Corp. 440 *et seq.*

6. Union Bank of Maryland v. Ridgely, 1 Harris & G. 324; Rex v. Westwood, 2 Dow & C. 21; Clark Corp. 441.

7. *Ex parte* Willcocks, 7 Cowen, 402; Cahill v. Kalamazoo Ins. Co., 2 Doug. Mich. 124; Clark Corp. id.

8. Dunston v. Imperial Gas Company, 3 B. & Ad. 125.

9. Union Bank v. Ridgely, 1 Harris & G. 324.

The same body in a corporation which has a power to make, has, also, the power to repeal, by-laws; it being of the very nature of legislative power, that, by timely changes in the rule it prescribes, it should be enabled to meet the exigencies of the occasion.[1] As a court will direct a jury to find a by-law, its terms, and adoption, from the usage and conduct of the corporation and its officers, so, from non-observance of one, will it presume a subsequent by-law to repeal and alter it.[2]

Eleemosynary corporations are distinguished from others in this, that they have no incidental power of legislation. They are the mere creatures of their founder, and he alone has a right to prescribe the regulations according to which his charity shall be applied. His statutes are accordingly their laws, which they have no power to alter, modify, or amend.[3] A delay to make them for a few years after the foundation, does not affect the right or power to make them.[4] He cannot, however, by his statutes, alter the constitution of the charity as fixed in the charter granted to him; but may do what is necessary, by regulation, for the maintenance of the charity he has founded.

All by-laws of a corporation contrary to the Constitution of the United States, and the Acts of Congress in pursuance of it, to the Constitution and valid statutes of the State in which it is established, and to the common law as it is accepted there, are void.[5] For this reason, a by-law, "impairing the obligation of contracts," or taking "private

1. King v. Ashwell, 12 East. 22; Rex v. Westwood, 4 B. & C. 806.

2. Attorney-General v. Middleton, 2 Ves. Sen. 328; see, too, Berwick-upon-Tweed v. Johnson, Lofft. 338.

3. Phillips v. Bury, 1 Ld. Raym. 8, per Holt, C. J., Comb. 265, Holt, 715, 1 Show. 360, 4 Mod. 106, Skin. 447, 2 T. R. 352; Bentley v. Bishop of Ely, Fitzgib. 305, Stra. 912; St. John's College, Cambridge, v. Todington, 1 Burr. 201; Green v. Rutherforth, 1 Ves. Sen. 462; Phillips Academy v. King, 12 Mass. 546; Dartmouth College v. Woodward, 4 Wheat. 660.

4. Regina v. God's Gift in Dulwich, 17 Q. B. 600, 8 Eng. L. & Eq. 398.

5. Clark Corp. 440; Norris v. Staps, Hob. 211; 5 Co. R. 63, Clark's case. See by-laws, 3 Salk. 76; Rex v. Barber Surgeons, 1 Ld. Raym. 585; Rex v. Miller, 6 T. R. 277; Rex v. Haythorne, 5 B. & C. 425; William v. Great Western R. Co., 10 Exch. 15, 28 Eng. L. & Eq. 439; Butchers Ben. Association, 35 Penn. State, 151.

property for public use, without just compensation," is void.[6]

The by-laws of a corporation must not be inconsistent with its charter; for this instrument creates it an artificial being, imparts to it its power, designates its object, and usually prescribes its mode of operation. It is, in short, the fundamental law of the corporation; and in its terms and spirit, as a constitution to the petty legislature of the body, acting by and under it. Hence all by-laws in contravention of it are void.[7]

By-laws must be reasonable; and all which are nugatory, and vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void.[8] Thus, a by-law, or rule of a bank, that all payments made and received must be examined at the time, does not prevent a party dealing with the bank from showing afterwards that there was a mistake in the accounts of deposits and receipts.[9] Whether a by-law is reasonable or not, is a question for the court solely; and evidence to the jury on the subject, showing the effects of the law, was held inadmissible.[1] To set aside a by-law, however, for unreasonableness, there should be no equipoise of opinion upon the matter, but its unreasonableness should be demonstrably shown.[2] Courts, in construing by-laws, will interpret them *reasonably;* not scrutinizing their terms for the purpose of making them void, nor holding them invalid if every particular reason for them does not appear.[3]

The power to make by-laws necessarily supposes the power to enforce them by pecuniary penalties, competent

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6. Clark on Corp. 440; Stuyvesant v. New York, 7 Cowen, 585. See State of New York v. New York, 3 Duer, 119.

7. Rex v. Spencer, 3 Burr. 1839; Clark Corp. 440.

8. Gosling v. Veley, 12 Q. B. 347; Cark Corp. 440.

9. Farmers Bank v. Smith, 19 Johns. 115; and see Gallatin v. Bradford, 1 Bibb, 209.

1. Com. v. Worcester, 3 Pick. 462.

2. Paxson v. Sweet, 1 Green, N. J. 196.

3. Vintners v. Passey, 1 Burr. 235, 239, Dennison, J.; Workingham v. Johnson, Cas. *temp.* Hardw. 285; Colchester v. Goodwin, Carter, 119, 120.

and proportionable to the offence;[4] and a penalty incurred may be enforced after the expiration of the period it was intended to regulate.[5]

CHAPTER XI.

OF THE POWER TO SUE AND THE LIABILITY TO BE SUED.

The power of a corporation to sue is one of its incidental powers, although it is most generally expressly given in charters to private corporations. Corporations, whether public or private, may commence and prosecute all actions, upon all promises and obligations, implied as well as expressed, made to them, which fall within the scope of their design, and the authority conferred upon them.[1] The suit must generally be brought or defended in the corporate name.[2] A company claiming to be incorporated has only to show that it has been regularly and effectually made a corporate body, to enable it to sustain a suit beyond the jurisdiction within which it is constituted.[3]

The legislature undoubtedly has power to prohibit foreign corporations from contracting in the State; but until it does so, contracts so made will be enforced.[4]

Assumpsit will lie against a corporation, where there is an express promise by an agent of the corporation, or a duty arising from some act or request of such agent, within the authority of the corporation.[5] Whenever a corporation is acting within the scope of the legitimate purposes of the corporation, all parol contracts made by its authorized

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4. Chamberlain of London's case, 5 Co. 63, b; The City of London's case, 8 Co. 253; 3 Leon. 265; Mobile v. Yuille, 3 Ala. 137; 2 Kyd on Corp. 156; Willcock on Mun. Corporations, 154, § 368.

5. Stevens v. Dimond, 6 N. H. 330.

1. Clark Corp. 114. See McKim v. Odom, 3 Bland, Ch. 417; Gordon v. Baltimore, 5 Gill, 231.

2. Bradley v. Richardson, 2 Blatchf. C. C. 343.

3. Dutch West India Company v. Van Moyses, 2 Ld. Raym. 1535; 1 Stra. 612.

4. Frazier v. Wilcox, 4 Rob. La. 518; Atterbury v. Knox, 4 B. Mon. 92.

5. Clark on Corp. 114; Hayden v. Middlesex T. Co., 10 Mass. 39; State v. Morris, 3 N. J. 360.

agents are express promises of the corporation, and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie.[6]

Incorporated companies may be sued in their corporate character for damages arising from neglect of duty, and notwithstanding some *dicta* to the contrary in the older cases, it may be taken for settled law, that both trover and trespass are maintainable against a corporation.[7]

A private corporation may be sued by one of its own members.[8] This point came directly before the court in the State of South Carolina, in an action of assumpsit against the Catawba Company. That in cases where the legal remedy against a corporation is inadequate, a Court of Equity will interfere, is well settled; and there are cases in which a bill in equity will lie against a corporation by one of its members. It is a breach of trust towards a shareholder in a joint-stock incorporated company, established for a certain definite purpose prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority; and, therefore, he may file a bill in equity against the company in his own behalf to restrain the company by injunction from any such diversion or misapplication.[9]

"A corporation may be criminally responsible for omission to perform a duty imposed upon it by law, or for nonfeasance.

In most States, but not in all, it is held that a corporation

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6. Bank of Columbia v. Patterson, 7 Cranch. 299; Danforth v. Turnpike Road, 12 John. 227.

7. Chitty on Plead. 68; Fowle v. Common Canal of Alexandria, 3 Pet. 409; Bushel v. Commonwealth Ins. Co., 15 S. & R. 173; Yarborough v. Bank of England, 16 East 6.

8. Waring v. Catawba Co., 2 Bay, 109.

9. Cunliff v. Manchester Canal Co., 2 Russ & M. 480, *note*. Dodge v. Woolsey, 18 How. 331; Manderson v. Commercial Bank, 28 Penn. State, 379; Baltimore R. Co. v. City of Wheeling, 13 Gratt. 40. As to whether such a bill of a single corporator against the corporation should aver that it is filed on behalf of himself and of all others similarly situated, see Wood v. Draper, 24 Barb. 187.

may be criminally responsible for some acts of misfeasance, such as maintaining a nuisance. But it cannot commit a crime which involves a mental operation, nor crimes involving an element of personal violence.

"A corporation may be punished for contempt of court."[1]

CHAPTER XII.

DISFRANCHISEMENT AND AMOTION OF MEMBERS AND OFFICERS.

A distinction has been pointed out (and one which has not been always regarded) by Willcock, in his treatise on Municipal Corporations,[1] **between disfranchisement and amotion.** "**Disfranchisement**" is applicable only to the rights of a member of a corporation, as such; for every member of a corporation, as it has been asserted by Blackstone,[2] is understood to have "a franchise, or freedom;" and therefore when a member is deprived of this franchise, by being expelled, it may aptly be said, that he has been disfranchised. The term applies to *members*, but the term "**amotion**" applies only to such members as are *officers*; and, consequently, if an officer be removed for good cause, he may still continue to be a member.

Misconduct in a corporate office warrants only an amotion from that particular office, and, as is obvious, may not always warrant an exclusion from the franchise, or the incidental rights of membership.

With regard to what are called joint-stock incorporated companies, or indeed any corporations owning property, a member cannot be expelled, and thus deprived of his intrest in the stock or general fund, in any case, by a majority of the corporators, unless such power has been expressly conferred by the charter. And if an owner of stock could be excluded, without any provision in the charter, from

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1. Clark on Corp. 198, 200, and notes where the cases are collected; Wash. Cr. Law (3d ed.), 23, and notes.

1. Willcock on Mun. Corp. 270. See Clark Corp. 520.

2. 2 Bl. Com. *37 (Vol. 1).

participating in the election of officers, and in the other affairs of the company, he would still be entitled to the amount of his stock, and could recover it in an action against the corporation.[3]

A corporation possesses inherently the power of expelling members in certain cases, as such power is necessary to the good order and government of corporate bodies; and that the cases in which this inherent power may be exercised, are of three kinds: 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as renders him unfit for the society of honest men; such are the offences of perjury, forgery, &c. But before an expulsion is made for a cause of this kind, it is necessary that there should be a previous conviction by a jury, according to the law of the land. 2. When the offence is against his *duty as a corporator;* in which case he may be expelled on trial and conviction by the corporation. 3. The third is an offence of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land.[4] But these principles, as before suggested, cannot be considered applicable to corporations, the members of which are stockholders. And where the visitatorial power is vested in trustees, in virtue of their incorporation, there can be no removal of them; though they are subject, as managers of the revenues of the corporation, to the superintending power of chancery, which (without comprehending a visitatorial authority, or a right to control the charity) includes a general jurisdiction in all cases of an abuse of trusts, to redress grievances and suppress frauds. Indeed, where a corporation is a mere trustee of a charity, a Court of Equity will go yet further; and though it cannot appoint or amove a corporator, it will, in a case of gross fraud or abuse of trust, take the trust from the corporation, and vest it in other hands.[5]

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3. Clark Corp. 389; Davis v. Bank of England, 2 Bing. 393; State v. Tudor, 5 Day, 329; Delacy v. Neuse River Nav. Co., 1 Hawks. 520; Ebaugh v. Herdel, 5 Watts, 43.

4. Clark Corp. 389; Commonwealth v. St. Patrick Society, 2 Binn. 448; and see the opinion of Lord Mansfield, in Rex v. Richardson, 2 Burr. 536.

5. Dartmouth College v. Woodward, 4 Wheat. 676, 688; Society for

When the charter expressly authorizes the expulsion of members in certain specific cases, it does not follow that the power of expulsion may not be exercised in other cases, when the good government of the corporation requires it, unless it is positively confined to particular offences.[6]

Where the charter of an association provides for an offence, directs the mode of proceeding, and authorizes the society, on conviction of a member, to expel him, an expulsion, if the proceedings have been regular, is conclusive, and cannot be inquired into collaterally by mandamus, or by any other mode.[7]

In none of the above cases, wherein it is considered that there is just and sufficient cause for amotion, can the party be expelled, unless he has been *duly notified* to appear.[8] And where a corporation strikes off one of its members, without giving previous notice, and affording an opportunity to be heard, a *mandamus* to restore him will be granted.[9] This notice may of course be dispensed with, when the party has appeared at the meeting, and either defended himself, or answered or confessed the charge against him; for this is a waiver of his right to notice.[1]

The power of disfranchisement and amotion, unless it has been expressly confided to a particular person or class, is to be exercised by the corporation at large, and not by the person or class in whom the right of appointing or admitting is vested.[2]

An office may be resigned in two ways; either by an **express agreement** between the officer and the corporation, or by such **an agreement** implied from his being elected to

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the Propagation of the Gospel v. New Haven, 8 Wheat. 464; Fuller v. Plainfield Academic School, 6 Conn. 532.

6. Commonwealth v. St. Patrick's Society, 4 Binn. 448; Commonwealth v. Philanthropic Society, 5 Binn. 486.

7. Commonwealth v. Pike Beneficial Society, 8 Watts & S. 247.

8. Clark Corp. 391; Willcock on Mun. Corp. 264; Fuller v. Plainfield Academic School, 6 Conn. 532.

9. Clark Corp. id.; Delacey v. Neuse Navigation Co., 1 Hawks 274.

1. Willcock on Mun. Corp. 265. See, generally, Clark Corp. 391, and cases cited.

2. Willcock on Mun. Corp. 245, 246; Lord Bruce's case, 2 Stra. 819; Rex v. Lyme Regis, Doug. 153; Rex v. Richardson, 1 Burr. 530; Rex v. Feversham, 8 T. R. 536; Bagg's case, 11 Co. 29.

another office incompatible with it.[3] Where neither the charter nor by-laws prescribe any particular form in which the members may resign their rights of membership, and their resignation be accepted, such resignation and acceptance may be implied from the acts of the parties.[4] To complete a resignation, it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, and thereby treating it as vacant.[4a]

A resignation by *implication* may not only take place by an abandonment of the official duties, as before mentioned, but also by being appointed to and accepting a new office incompatible with the former one.[5]

CHAPTER XIII.

OF THE TAXATION OF CORPORATIONS.

Taxes are burdens or charges imposed upon property or persons to raise money for public purposes, when the income of public property is insufficient for the public exigencies and welfare.

The rules as to the taxation of corporations are so well summarized by Mr. Clark in the 2nd edition of his work on corporations, that we quote them in full:

"**Unless a corporation is expressly exempted from taxation by its charter, the State may tax it to the same extent as it may tax individuals,** without impairing the contract implied between the State and the corporation. But the power to tax is not unlimited.[1]

Taxes can only be imposed for a public purpose.

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3. Willcock on Mun. Corp. 238.

4. State v. Ancker, 2 Rich. 245.

4a. Rex v. Lane, 2 Ld. Raym. 1304, 11 Mod. 270; Jenning's case, 12 Mod. 402.

5. Willcock on Mun. Corp. 240; Gabriel v. Clarke, Cro. Car. 138; Verrior v. Sandwich, 1 Sid. 305; Rex v. Godwin, Doug. 383, n. 22; Milward v. Thatcher, 2 T. R. 87; Rex v. Pateman, 2 T. R. 779.

1. Clark Corp. 219, 220, where the subject is considered in detail and the cases collected in the notes.

The taxing power is limited to persons, property, and business within the jurisdiction of the State.

Provisions of the State Constitution must not be violated, such as provisions requiring uniformity and equality of taxation.

In the absence of constitutional limitations, double taxation is not prohibited, but in a number of states it is prohibited by constitution. Even where not prohibited, it is unjust, and in construing statutes all presumptions are against it.

Provisions of the Federal Constitution must not be violated, such as the provision that no State shall deny to any person within its jurisdiction the equal protection of the laws. This prohibits unequal taxation.

The provision that no State shall pass any law impairing the obligation of contracts prevents taxation of a corporation in violation of the express terms of the charter.

As government bonds cannot be taxed, capital invested in them is exempt. No tax can be imposed which will amount, to a regulation of or interference with interstate commerce.

The States cannot interfere by taxation with the operation of corporations created by Congress for the purpose of carrying into effect the constitutional powers of the Federal Government, except so far as permitted by Congress.

However, by the weight of authority a State in creating a corporation or afterwards for a consideration, but not otherwise, may agree that it shall be exempt from taxation in whole or in part; and it cannot in such a case, impose a tax in violation of the charter without imparing the obligation of its contract. But exemption from taxation must be clearly shown. All presumptions are against it, and an exemption from taxation may be revoked if the State has reserved the power to repeal, alter, or amend the charter. A corporation cannot escape liability for taxes on the plea of *ultra vires.*"[2]

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2. See the leading case of Dartmouth College v. Woodward, 4 Wheat. 518; Clark on Corp. 202; Cooley's Const. Lim. (7th ed.), 175, 395, 396; Cooley on Taxation, 146, and cases cited. The student is especially ad-

CHAPTER XIV.

OF THE CORPORATE MEETINGS, AND OF THE CONCURRENCE NECESSARY TO DO CORPORATE ACTS.

The principal points to be considered under the above title, are in respect to the mode of convening a corporate meeting, the place of meeting, and the number of members, or of certain officers required to be present, in order to render the acts, done at the meeting of the assembly, valid.

The rule applicable to municipal corporations, namely, that all corporate affairs must be transacted at an assembly convened upon due notice, at a proper time and place, consisting of the proper number of persons, the proper officers, classes, &c., will in general apply to private corporations.[1] **The presumption is, that every member knows what days and times are appointed by the charter, by-laws, or by usage for the transaction of particular business;** and, therefore, no special notice is requisite for assembling to transact the business specially allotted for such days. In most private corporations, there is a particular day appointed for the election of officers; and when the day is thus appointed for an election, no particular notice may be required.[2] Neither, if a particular day is appointed in each year (as is often the case in charters to private corporations in the United States) for the transaction of all business, is a notice required of the particular business which is to be done.[3]

If, however, the meeting is special, notice of the business to be transacted must be given.[4]

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vised to consult and read case, and authors just cited on this question. The subject of taxation is too extensive to be more fully considered in this volume. Other works on taxation are: Booles' Foreign Corporations and Taxation of Corporations (1904); Blackwell on Tax Titles (2 Vols., 1889); Burroughs on Taxation (1883); Gray on Limitations of Taxing Power (1906); Merrill's Taxation of Corporations (1901); Nichols on Eminent Domain (1909).

1. See, generally, Clark Corp. 448.

2. Willcock, 42; Rex v. Hill, 4 B. & C. 441, 443; Rex v. Carmarthen, 1 M. & S. 702.

3. Clark Corp. 448; Warner v. Mower, 11 Vt. 385; Sampson v. Bowdoinham Steam Mill Corp., 36 Me. 78.

4. Clark Corp. 448.

The notice must be issued by order of some one who has authority to assemble the corporation; though the want of authority in such case may be waived by the presence and consent of all who have a right to vote.[5] The meetings of a joint-stock corporation must be called by a **personal notice** to all the members unless some other provision is made in the charter or in a by-law; and a vote passed at a meeting not so called, is not binding.[6]

In order to guard against and prevent surprise, the notice must be given a **reasonable time before the hour of meeting**; and what is a reasonable time, of course depends upon the circumstances of the case.[7] If the members be duly assembled, they may unanimously agree to waive the necessity of notice, and proceed to business; but if any one person having a right to vote is absent or refuses his consent, all extraordinary proceedings are illegal.[8]

If there is no proper place established for the transaction of the regular business of the corporation, some place in particular should be appointed in the notice. All acts done at an unusual place by a municipal corporation carry the appearance of contrivance, secrecy, and fraud.[9] All votes and proceedings of persons professing to act in the capacity of corporations, when assembled beyond the bounds of the State granting the charter of the corporation, are wholly void.[1]

Corporations are subject to the principle (supposing the charter to be silent), **that the whole are bound by the acts of the majority**, when those acts are conformable to the articles of the constitution.[2] But the rule, that the acts and proceedings of a majority, at a meeting properly convened,

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5. Clark Corp. ib.; Rex v. Gaborian, 11 East, 86, n.; Rex v. Hill, 4 B. & C. 441; Jones v. Milton T. Co., 7 Ind. 547.

6. Clark Corp. 448; Wiggins v. Free Will Baptist Society, 8 Met. 301.

7. Clark Corp. 448. See Campbell v. Pultney, 6 Gill & J. 94; and the matter of the Mohawk Railroad, &c. Co., 19 Wend. 135; *In re* Barker, 6 Wend. 509.

8. Id.; Rex v. Hill, 4 B. & C. 442; Rex v. May, 5 Burr. 2682.

9. Clark Corp. 448; Rex v. May, 5 Burr. 2682.

1. Clark Corp. 448; Miller v. Ewer, 27 Me. 509.

2. St. Mary's Church, 7 S. & R. 517; Clark Corp. 449.

are binding on the minority, is confined to temporal affairs; matters of faith, in the case of a religious corporation, being governed by a different rule.[3]

There is this distinction between a corporate act to be done by a definite number of persons, and one to be performed by an indefinite number. In the first case, a majority is necessary to constitute a quorum, and that no act can be done unless a majority be present; in the latter, a majority of any number of those who appear may act.[4] When a corporation consists of several integral parts, one of which is *indefinite*, if any number of persons composing the latter, however small, are present after having been duly summoned, it is sufficient. The distinction is between a definite and an indefinite number. In the former case a majority must be present; whereas in the latter a majority of those present may act, whether a majority of the whole body or not.[5]

Acts purporting to be done by corporations, which relate to the constitution and the rules of government of the body corporate, are not to be considered as having received a legal concurrence, merely because they appear under the corporate seal; and the court have authority to inquire, in such cases, by what authority the seal was affixed.[6]

The books and minutes of a corporation, if there is nothing to raise a suspicion that the corporate proceedings have been irregular, will be treated and referred to as evidence of the legality of the proceedings. Thus, the books are admissible to prove the organization and existence of the corporation.[7] The recording officer of a corporation may make and verify copies of its records, and of the verity of such copies his certificates are evidence; but it is no part of the duty of such officer to certify facts, nor can his certificate be received as evidence of such facts.[8] As against the corporation, it is to be presumed that the forms required

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3. See *ante*, § 38; Miller v. English, 1 N. J. 317; Smith v. Erb, 4 Gill, 437.

4. *Ex parte* Willcox, 7 Com. 402.

5. Clark Corp. 449; Willcock on Mun. Corp. 66; Rex v. Whitaker, 9 B. & C. 648.

6. St. Mary's Church, 7 S. & R. 530.

7. Grays v. Lynchburg T. Co., 4 Rand. 578; Buncombe T. Co. v. McCarson, 1 Dev. & B. 306.

8. Oakes v. Hill, 14 Pick. 442.

by the charter have been complied with, and, therefore, it lies upon it, where it seeks to avail itself of any default in this respect, to give strict proof thereof.[9]

CHAPTER XV.

OF SUBSCRIPTIONS FOR, AND ASSESSMENTS UPON, SHARES IN JOINT-STOCK CORPORATIONS.

A subscription for shares in the stock of a joint-stock incorporated company, is a contract; and the interest thereby acquired is a sufficient consideration to enable the company to support an action against the subscriber for a recovery of the amount subscribed.[1] A person subscribing *before the organization* of a proposed incorporated joint-stock company, raises a mutuality in his contract which will render him liable to the company after incorporation.[2]

But to render a subscription for stock a contract, a due consideration must appear; for *voluntary* agreements and promises, however reasonable the expectation from them of gifts and disbursements to public uses, are not to be enforced as contracts.[3]

Where a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a *bona fide* subscriber, by which he has either sustained, or might sustain, injury, no action can be maintained against him by the corporation for the amount of his subscription; unless such subscriber has accepted the charter, and by his *own acts* has assisted in putting it in operation; in that case, he cannot avail himself of the fact that part of the stock was fictitious.[4] And if a stock company lets off a part of its subscribers, and returns them their money, other subscribers not consenting thereto are

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9. Hill v. Manchester Waterworks Co., 5 B. & Ad. 874; Clarke v. Imperial Gas Light Co., 4 id. 324.

1. Clark Corp. 260; Birmingham R. Co. v. White, 1 Q. B. 541; Baltimore T. Co. v. Barnes, 6 Harris & J. 57; Small v. Herkimer Man. Co., 2 Comst. 330; Mann v. Pentz, 2 Sandf. Ch. 258.

2. Kidwelly Canal Co. v. Raby, 2 Price, 93.

3. See Clark Corp. 260.

4. Centre T. Co. v. M'Conaby, 16 S. & R. 140.

discharged from all liability growing out of their original subscriptions.[5] If a person is induced to subscribe for stock by means of representations which are not fulfilled, it has been held that he is not bound to take the stock.[6] But generally parol representations or agreements made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible and void, unless fraud is shown.[7]

If a corporation procure an alteration to be made in its charter, by which a new and different business is superadded to that originally contemplated, such of the stockholders as do not assent to the alteration, will be absolved from liability on their subscriptions to the capital stock; and *a fortiori*, if the alteration be one plainly prejudicial to their interests.[8]

A power conferred by the legislature on a corporation, to sell the stock for default of payment of an instalment by a subscriber, does not exclude the common-law remedy to recover it, and he is still liable on an action of assumpsit. The penalty of forfeiture is cumulative, so that the company may waive it and proceed *in personam* on the promise.[9]

When it is said that remedies by action or forfeiture are *cumulative*, nothing more is to be understood, than that the company has a right to sue, or the right to forfeit, at their election; or that they may proceed to judgment upon the subscription, and then forfeit the stock for the same delinquency. But the converse of the proposition, that they may exercise the right of forfeiture, and *then* maintain or enforce a judgment, is not maintainable. A forfeiture is more than a means of satisfaction, and is of itself a satisfaction. It has, therefore, been held that after a corporation, pursuant to a provision in its charter, has forfeited the stock of a subscriber, for non-payment of an instalment due upon

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5. McCully v. Pittsburgh R. Co., 32 Penn. State, 25.

6. Rives v. P. R. Co., 30 Ala. 92.

7. Smith v. P. R. Co., 30 Ala. 650, 667; Johnson v. Crawfordsville R. Co., 11 Ind. 280; Piscataqua Ferry Co. v. Jones, 39 N. H. 491.

8. So laid down by Nelson, C. J., in New Haven R. Co. v. Crosswell, 5 Hill, 383; Union Locks & Canal Co. v. Towne, 1 N. H. 44.

9. London R. Co. v. Graham, 1 A. & E. 270; Goshen T. Co. v. Hurtin, 9 Johns. 217.

his subscription, it cannot maintain an action to recover any part of such subscription.[1]

If a part of the authorized capital stock of a corporation remains untaken at the time of its incorporation, the right to issue the remainder of it is a corporate franchise, held by the corporation in trust for the corporators, and it is to be disposed of for the benefit of all; and the directors have no right to distribute such share of stock among those of the stockholders merely who are not in arrear on the shares already taken by them, and exclude those who are in arrear.[2]

CHAPTER XVI.

OF THE NATURE AND TRANSFER OF STOCK IN JOINT-STOCK INCORPORATED COMPANIES.

The term "joint-stock" corporation, means such a corporation as has for its object a dividend of profits among its stockholders. A corporation of this sort is invariably empowered to raise a certain amount of capital, by the mutual subscriptions of its members; and this capital is divided into *shares*, which are made to vest in the subscribers according to their respective contributions; and they entitle the holders of them to a corresponding proportionate part of the profits of the undertaking. Generally the number of shares is fixed by the charter, but sometimes it is provided that there shall be not less than a certain number nor more than another number. In such a case it is left for the company to determine the number within the limits prescribed.[3]

A share in one of these companies may be defined to be a right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted.[4] It is be-

1. Small v. Herkimer Man. Co., 2 Comst. 330.

2. Reese v. Bank of Montgomery Co., 31 Penn. State, 78.

3. Somerset R. Co. v. Cushing, 45 Me. 524. See *ante*.

4. See Clark Corp. 254; Jones v. Terre Haute R. Co., 29 Barb. 353.

lieved to be not unusual for the act of incorporation to provide that this interest shall be *personal* property, though it must be so regarded independently of any enactment to that effect; and this, notwithstanding it arises, in a measure, out of *realty;* it being the surplus profit only that is divisible among the individual shareholders.[5]

Where, however, lands are vested in the individual shareholders, and the management is only in the corporation, the shares are real estate; for the company has no power of converting it into any other sort of property, and indeed is not seised, as a corporation, of the land.[6] If a company purchase property, each individual shareholder has an interest in it; but the moment the company becomes a corporation, the corporation, if invested with the legal title, has the property in trust for the individuals.

Shares in joint-stock companies are not, however, strictly speaking, chattels; and it has been considered that they bear a greater resemblance to choses in action; or, in other words, they are merely evidence of property.[7] They are, it is held, mere demands for dividends, as the become due, and differ from movable property, which is capable of possession and manual apprehension.[8]

In most of the States a sale of shares in a corporation like a sale of other choses in action is within the seventeenth section of the Statute of Frauds, relating to agreements for the sale of "goods, wares and merchandises."[9] The rule is otherwise in England.[1]

A contract for the sale of stock becomes executed by a delivery to the purchaser of certificates of the shares, such delivery being analogous to the delivery of chattels, and so rendering the transfer complete.[2] But a person to whom

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5. Clark Corp. 254.

6. Drybutter v. Bartholomew, 2 P. Wms. 127; Stafford v. Buckley, 2 Ves. Sen. 182; Weekley v. Weekley, 2 Younge & C. Exch. 281; Buckeridge v. Ingran, 2 Ves. Jr. 652.

7. Clark Corp. 254.

8. Wildman v. Wildman, 9 Ves. 177; Kirby v. Potter, 4 id. 751; Planters Bank v. Merchants Bank, 4 Ala. 753; Denton v. Livingston, 9 Johns. 96.

9. Clark Corp. 254.

1. Id. 256.

2. See opinion of Parker, C. J., in Howe v. Starkweather, 17 Mass. 243; Sargent v. Franklin Ins. Co., 8 Pick. 98.

shares have been *bona fide* transferred will hold them without any certificate.[3]

As stock may be sold, so it may be pledged;[4] but the possession may still continue in the pledgor consistently with the nature of the contract, till the title is made absolute in the pledgee. The transfer of the legal title to stock is not inconsistent with a pledge of it.[5]

From the nature of corporate stock, which is created by, and under the authority of, a State, it is necessarily, like every other attribute of the corporation, governed by the local law of that State, and not by the local law of any foreign State.[6]

Where property is of so *intangible* a nature, as shares in the stock of a corporation, that there can be no change of possession, and it cannot be known whether they are attached or not, **the sale of them on execution is a mode of transfer not authorized by the Common Law.**[7] By statute, however, they are now generally made subject to execution and attachment.[8]

CHAPTER XVII.

OF THE PERSONAL LIABILITY OF THE MEMBERS OF JOINT-STOCK INCORPORATED COMPANIES, FOR THE DEBTS OF THE CORPORATION.

Civil corporations established for the purposes of trade and commercial adventure are to be distinguished from the common association of partnership, in respect to the **personal liability of the members for the company debts.** No such personal liability, attaches to the individuals united under the sanction of the government, and invested by charter or other act of legislation, with the full powers and immunities of a corporate body; while, on the other hand,

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3. Ellis v. Essex Merrimac Bridge Co., 2 Pick. 243.

4. Marine Bank v. Biays, 4 Harris & J. 338.

5. Wilson v. Little, 2 Comst. 443.

6. Black v. Zacharie, 3 How. 483.

7. Clark Corp. 254; Howe v. Starkweather, 17 Mass. 240; Denny v. Hamilton, 16 id. 402.

8. Clark Corp. 254.

each and every individual of a common partnership association is personally responsible for every debt of the firm.[1]

Where, however, an association, which has existed as a mere co-partnership, becomes incorporated, and the corporation then accepts an assignment of all the property of such association, for the purpose of carrying out objects, they are primarily, and jointly and severally liable for all the debts incurred before the act of incorporation.[2]

It has been the legislative policy, in some of the States, to provide, in acts of incorporation of companies who have for their object a dividend of profits among the stockholders, that each stockholder shall, to a greater or less extent, be personally liable in his *private estate* for the company debts.[3]

CHAPTER XVIII.

OF THE VISITATORIAL POWER AS TO ELEEMOSYNARY CORPORATIONS.

To render the charters or constitutions, ordinances, and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation; or, in other words, to the inspection and control of tribunals recognized by the laws of the land. Civil corporations are visited by the government itself, through the medium of the courts of justice;[4] but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor.[5] This difference in the tribunals naturally results

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1. See this topic considered, *post*, in Partnership.

2. Haslett v. Wotherspoon, 1 Strob. Eq. 209.

3. Middletown Bank v. Magill, 5 Conn. 28, and Southmayd v. Russ, 3 id. 52. Since this liability depends entirely upon statutory provisions, the student should consult the local statutes.

4 Kyd on Corp. 174; 2 Kent, Com. 300, 301; Amherst Academy v. Cowls, 6 Pick. 433, Parker, C. J.; Binney's case, 2 Bland, Ch. 141. See Clark Corp. 201.

5. Per Holt, C. J., 1 Show. 252; 1 Bl. Com. 480, 2 Kyd on Corp. 174; 2 Kent, Com. 300, 301; Binney's case, 2 Bland, Ch. 141; University of Maryland v. Williams, 9 Gill & J. 401; Murdock's Appeal, 7 Pick. 303.

from a difference in the nature and objects of corporations. Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of that sovereign power whose duty it is to take care of the public interest; whereas, corporations, whose object is the distribution of a private benefaction, may well find jealous guardians in the zeal or vanity of the founder, his heirs or appointees.

Lord Mansfield, in commenting upon the convenience of the tribunal of a visitor, observes: "It is a *forum domesticum*, calculated to determine *sine strepitu* all disputes that arise within learned bodies; and the exercise of it is in no instance more convenient, than in that of elections. If the learning, morals, or proprietary qualifications of students were determinable at common law, and subject to the same reviews as in legal actions, there would be the utmost confusion and uncertainty; while he, who has the right, may possibly be kept out of the profits, of what is in itself but a temporary subsistence. This power, therefore, being exercised properly and without parade, is of infinite use."[6] In this country, where there is no individual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuse or neglects which at common law would cause a forfeiture of their charters.[7]

The visitatorial power, in England, of the bishop over the ecclesiastical corporations within his diocese, finds its origin and rules in the ecclesiastical polity of that country; and as this does not apply to our religious institutions, we propose in this chapter to treat of the power of visitation, in reference to eleemosynary corporations only.

Private and particular corporations, founded and endowed by individuals for charitable purposes, are, without any special reservation of power to that effect, subject to the private government of the founder and his heirs; not from any ecclesiastical canons or constitutions, but by appointment of law, as an incidental right, arising from the property which the founder had in the land or funds assigned to support the charity.[8]

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6. The King v. Bishop of Ely, 1 W. Bl. 82.

7. Amherst Academy v. Cowls, 6 Pick. 433, Parker, C. J.

8. Per Holt, C. J., Phillips v. Bury, Skin. 447, 1 Ld. Raym. 5, 2 T. R. 346; Eden v. Foster, 2 P. Wms. 326; Attorney-General v. Rigby, 3 P. Wms. 145; Green v. Rutherford, 1 Ves. 472; Attorney-General v. Gaunt, 3 Swanst. 148, n. 1; Dartmouth College v. Woodward, 4 Wheat. 673, 674, per Story, J.; Murdock, appellant, &c., 7 Pick. 322, per Parker, C. J.; Murdock

The origin of such a power, says Lord Hardwicke, is the property of the donor, and the power every one has to dispose, direct, and regulate his own property; like the case of patronage, *cujus est dare, ejus est disponere;* and, therefore, if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder, or his heirs, or the person specially appointed by him to be visitor, to determine concerning his own creature.[9] Although the rule, that in the absence of any appointment of visitors by the founder, the visitatorial power rests in his heirs, seems always to have been recognized as law in this country, yet the difference between the condition of heirs in England, where the inheritance descends to the eldest son or brother, and in this country, where it vests in all the children, male and female, indifferently, is such, as would render the rule extremely difficult of application in practice, especially after a considerable lapse of time and many descents cast. If such inconveniences are found to be numerous and formidable in practice, the remedy, it is presumed, must be sought in legislative interposition.[1] But the founder may, if he please, at the time of endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it to the exclusion of the founder's heirs.[2]

The visitatorial power over colleges, academies, and schools in this country, together with all other powers, franchises, and rights of property belonging to them, are usually vested in boards of trustees or overseers, established by charter, who have a permanent title to their offices, which can be divested only in the manner pointed out in the charter.[3] Sometimes, however, these boards are, by the will of the testator, or the statutes of his foundation, subjected to the visitation of some other board created by law, and vested with municipal authority, as the selectmen

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v. Phillips Academy, 12 Pick. 244; Sanderson v. White, 18 Pick. 334, 335, Shaw, C. J.

9. Green v. Rutherford, 1 Ves. 472, Per Lord Hardwicke; Eden v. Foster, 2 P. Wms. 325; Gilv. Eq. 78; Sel. C. in Ch. 36; Attorney-General v. York, Archbishop, 2 Russ. & M. 717.

1. Sanderson v. White, 18 Pick. 335, 336, where see the subject briefly and luminously discussed by Shaw, C. J.

2. Eden v. Foster, 2 P. Wms. 325; Attorney-General v. Middleton, 2 Ves. 327; St. John's College v. Todington, 1 W. Bl. 84, 1 Burr. 158; Attorney-General v. Clare College, 3 Atk. 662, 1 Ves. 78; Dartmouth College v. Woodward, 4 Wheat. 674, per Story, J.; Murdock's Appeal, 7 Pick. 322, per Parker, C. J.; Nelson v. Cushing, 2 Cush. 530.

3. Dartmouth College v. Woodward, 4 Wheat. 518; Sanderson v. White, 18 Pick. 338, Shaw, C. J.

of a town. In such case the board of visitors, in the visitatorial powers to be exercised by them, are not the agents of the town; nor are they acting directly upon the interests of the town, or accountable to the town; and cannot be directed, controlled, limited or restrained, in the exercise of their powers, by the act of the town. They exercise a special authority, created by the will of the testator, and where the trustees are incorporated, conferred by the act of incorporation.[4]

If the statutes of the foundation direct the mode in which the visitatorial power shall be exercised, that mode must be pursued, otherwise the sentence is a nullity.[5] But it should be recollected, that though a mode of visitation is prescribed in any particular case, this will not take away the general powers incident to the office of visitor.[6]

The proceeding before visitors, for the removal of a professor, is a judicial proceeding; and to render it binding on him, there must be a monition or citation to him to appear, a charge given to him, which he is to answer, a competent time assigned for proofs and answers, liberty for counsel to defend him, and to except to proofs and witnesses, and a sentence after a hearing of all the proofs and answers. It is not, indeed, to be insisted on, that in exercising the powers vested in a new jurisdiction, where no forms are prescribed, any precise course as to forms is to be followed; but these rules must in substance be pursued by every tribunal acting judicially upon the rights of others.[7]

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4. Nelson v. Cushing, 2 Cush. 529.

5. Phillips v. Bury, 2 T. R. 348, per Holt, C. J.

6. The King v. Bishop of Ely, 1 W. Bl. 83, per Lord Mansfield.

7. Murdock v. Phillips Academy, 12 Pick. 262, 263, Shaw, C. J.; Murdock's Appeal, 7 Pick. 329, 330; and see Garnett v. Ferrand, 6 B. & C. 611.

CHAPTER XIX.

OF THE DISSOLUTION AND REVIVAL OF A CORPORATION.

By the theory of the British Constitution, parliament is omnipotent; and hence an act of that body would undoubtedly be effectual to the dissolution of a corporation.[1] It is to the honor of the British nation, however, that this power, restrained by public opinion, rests mainly in theory; and except in the instances of the suppression of the order of Templars, in the time of Edward the Second,[2] and of the religious houses in the time of Henry the Eighth,[3] we know of no occasion on which parliament have thought proper to dissolve, or confirm the arbitrary dissolution of corporate bodies.

With reference to the power of the States over corporations, the constitutional provision prohibiting the impairing of the obligation of contracts does not prohibit the exercise by the State of the police power; nor does it prevent the exercise of the right of eminent domain, due compensation being made. Where the power to repeal, alter or amend is reserved by the State in granting the charter, the charter does not constitute a contract, and may therefore be repealed, altered or amended by the State.[4]

By the death of all its members a corporation aggregate is, or rather may be, dissolved.[5] And where from death or disfranchisement so few remain, that by the constitution of the corporation they cannot continue the succession, to all purposes of action at least, the corporation itself is dissolved.[6] As long, however, as the remaining corporators

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1. 1 Co. Lit. 176, n.; Bl. Com. 160, 485; 3 Kyd on Corp. 446, 447; Vanhorne v. Dorrance, 2 Dallas, 307, 308, per Patterson, J.; Dartmouth College v. Woodward, 4 Wheat. 643, per Marshall, C. J.; 2 Kent, Com. 305.

2. See Sawyer's Arg. Quo Warranto, 13; 2 Kyd on Corp. 446.

3. 1 Hallam's Const. Hist. of England, 94 *et seq.*

4. Clark Corp. 201. 230.

5. 20 H. 6, 7; Bro. Mortmain; 1 Inst. 13b; 2 Kyd on Corp. 447, 448; Canal Co. v. Railroad Co., 4 Gill & J. 1; McIntire Poor School v. Zanesville Canal Co., 9 Ohio, 203; Penobscot Boom Co. v. Lamson, 16 Me. 224; Boston Glass Manufactory v. Langdon, 24 Pick. 52.

6. 2 Kyd on Corp. 448; Clark Corp. 230.

are sufficient in number to continue the succession, the body remains; as though all the monks of an abbey died, yet if the abbot was alive, the corporation was not determined, since the abbot might profess others.[7]

Corporations have also been considered as dissolved by the loss of all or a majority of the members of any integral part, or select body, without which they cannot transact their municipal business, unless the power of restoration is vested in the subsisting parts of the corporation.[8]

Private corporations aggregate, as they are constituted in this country, are to be distinguished from the municipal corporations of England, in this, that they are not in general composed of integral parts. The stockholders compose the company; and the managers, or directors and officers, are their agents, necessary for the management of the affairs of the company, but not essential to its existence as such, and not forming an integral part. The corporation exists *per se* so far as is requisite to the maintenance of perpetual succession, and the holding and preserving of its franchises. The non-existence of the managers does not suppose the non-existence of the corporation. The latter may be dormant, its functions may be suspended for want of the means of action; but the capacity to restore its functionaries by means of new elections may remain. There is no reason why the power of action may not be revived by a new election of the managers and officers, competent to carry on the affairs of the corporation, conformably to the directions of its charter. When, therefore, the election of its managers, directors, or other officers, is by charter to be conducted solely by the stockholders, the charter or act of incorporation not requiring the managers, directors, or other officers to preside at, or to do any act in relation to the election, a failure to elect such officers on the charter day will not dissolve

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7. 11 Ed. IV. 4; 2 Kyd on Corp. 448; and see State v. Trustees of Vin. University, 5 Ind. 77; Clark Corp. 230.

8. Clark Corp. 230; Colchester v. Seaber, 3 Burr. 1870, 1 W. Bl. 591; Rex. v. Pasmore, 3 T. R. 241; Rex v. Miller, 6 T. R. 278; Rex v. Morris, 3 East, 216; 4 East, 26; Mayor of Colchester v. Brooke, 7 Q. B. 383-386.

the corporation, but the election of officers may take place on the next charter day without any new legislative aid.[9]

Another mode in which a corporation may be dissolved is, by the surrender of its franchise of being a corporation into the hands of the government, with its consent.[1]

A corporation may also be dissolved, by a forfeiture of its charter judiciously ascertained and declared. It was once doubted, whether the *being* of a corporation could be forfeited by a misapplication of the powers intrusted to it; but it is now well settled, that it is a tacit condition of a grant of incorporation, that the grantees shall act up to the end or design for which they were incorporated; and hence through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for a breach of trust.[2] In general, to work a forfeiture, there must be something wrong, arising from **wilful abuse** or improper **neglect, something more than accidental negligence, excess of power, or mistake** in the mode of exercising an acknowledged power. A single act of *abuser*, or *wilful non-feasance*, in a corporation, may be insisted on as a ground of total forfeiture; but a specific act of *non-feasance*, not committed *wilfully* or *negligently*, not producing nor having a tendency to produce mischievous consequences to any one, and not being contrary to any particular requisition of the char-

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9. Rose v. Turnp. Co., 3 Watts, 46; Blake v. Hinkle, 10 Yerg. 218; Lehigh Bridge Company v. Lehigh Coal Company, 4 Rawle, 9; Phillips v. Wickham, 1 Paige, 590; Russell v. McClellan, 14 Pick. 63; Evarts v. Killingworth Manuf. Co., 20 Conn. 447; Commonwealth v. Cullen, 13 Penn. State, 133.

1. Riddle v. Locks on Merrimack River, 7 Mass. 185, per Parsons, C. J.; Hampshire v. Franklin, 16 Mass. 86, 87; McLaren v. Pennington, 1 Paige, 107, per Walworth, Chan.; Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 45, 46, 52; Slee v. Bloom, 19 Johns. 456; 2 Kent, Com. 310, 311; Clark Corp. 230.

2. Clark Corp. 230; Tailors of Ipswich, 1 Roll. 5; Rex v. Grosvenor, 7 Mod. 199; Sir James Smith's case, 4 Mod. 55, 58, 12 Mod. 17, 18, Skin. 311, 1 Show. 278, 280; Rex v. Saunders, 3 East, 119; Rex v. Amery, 2 T. R. 515; Rex v. Pasmore, 3 T. R. 246, per Buller, J.; Eastern Archipelago Co. v. Regina, 2 Ellis & B. 857; Terrett v. Taylor, 9 Cranch, 51, 52, per Story, J.; Dartmouth College v. Woodward, 4 Wheat. 658, 659; Commonwealth v. Union Ins. Co., 5 Mass. 230; People v. Bank of Niagara, 6 Cowen, 196.

ter, will not work a forfeiture.[3] Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it and ground for its annulment, although it would be competent, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them.[4]

A cause of forfeiture cannot be taken advantage of, or enforced against a corporation, collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone instutite such a proceeding; since it may waive a broken condition of a compact made with it, as well as an individual.[5]

The mode of proceeding against a corporation, to enforce a repeal of the charter or a dissolution of the body, for cause of forfeiture, is by **scire facias,** or an information in the nature of a **quo warranto.** "A *scire facias,*" says Mr. Justice Ashurst, "is proper where there is a legal existing body, capable of acting, but who have been guilty of an abuse of the power intrusted to them;[6] and a *quo warranto* is necessary where there is a body corporate *de facto,* who take upon themselves to act as a body corporate, but from some defect in their constitution, cannot legally exercise the power they affect to use."[7] It would seem, however, that an information in the nature of *quo warranto* would lie against a legally existing corporation for an abuse of its franchises, as well as a writ of *scire facias.*[8]

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3. People v. Bristol T. R. 23 Wend. 222, Cowen, J.; Bank Commissioners v. Bank of Buffalo, 6 Paige, 497.

4. Eastern Achipelago Co. v. Regina, per Martin, B., 2 Ellis & B. 857.

5. Rex v. Stevenson, Yelv. 190; Rex v. Carmarthen, 1 W. Bl. 187, 2 Burr. 869; Rex v. Amery, 2 T. R. 515; Rex v. Pasmore, 3 T. R. 244; Terrett v. Taylor, 9 Cranch, 51; 2 Kent, Com. 316; Clark Corp. 230.

6. Rex v. Pasmore, 3 T. R. 244; and see Smith's case, 4 Mod. 57; Rex v. Wynne, 2 Barnard. 391; Clark Corp. 230.

7. Rex v. Pasmore, 3 T. R. 244, 245; Regents of the University of Maryland v. Williams, 9 Gill & J. 365; Clark Corp. 230.

8. 1 Bl. Com. 485; and see Case of City of London, cited 2 Kyd on Corp. 474-486, 487; People v. Bank of Niagara, 6 Cowen, 196; People v. Bank of Hudson, id. 217; People v. Washington & Warren Bank, id. 211.

The last mode in which a corporation may be dissolved, is, by expiry of the period of its duration, limited by its charter or by general law; upon dissolution in which mode, all the consequences of dissolution in any other mode, such as forfeiture of property, extinguishment of debts, abatement of suits, &c., ensue, unless, as is usual, they are provided against.[9] Upon such a dissolution, without previous provision, it is beyond the power of the legislature, by renewing the charter, to revive the debts and liabilities owing to the corporation.[1] The corporation may, however, just before the expiration of its corporate existence, assign to a trustee, for the use of stockholders, the corporate property, or indorse, through the cashier, its unpaid paper for such use; and the trustee may sue, in his own name, as indorsee of such paper, after the expiry of the charter.[2]

At common law, upon the civil death of a corporation, all its real estate remaining unsold, reverts to the grantor and his heirs; for the reversion, in such an event, is a condition annexed by law, inasmuch as the cause of the grant has failed.[3] The personal estate, in England, vests in the king; and in our own country, in the people or State, as succeeding to his right and prerogative of the crown.[4] The debts due to and from it are totally extinguished; so that neither the members nor directors of the corporation can recover, or be charged with them in their natural capacities.[5] The common law, in this particular, is, however, usually modified by charter or statute.[6] The rule of the common law, in relation to the effect of dissolution upon the property and

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9. Bank of Mississippi v. Wrenn, 3 Smedes & M. 791; Commercial Bank v. Lockwood, 2 Harring. Del. 8.

1. Bank v. Lockwood, 2 Harring. Del. 8.

2. Cooper v. Curtis, 30 Me. 488.

3. Co. Lit. 13b, 102b; Knight v. Wells, 1 Lut. 519; Edmunds v. Brown, 1 Lev. 237; Attorney-General v. Lord Gower, 9 Mod. 226; Colchester v. Seaber, 3 Burr. 1868, arg.; Rex v. Pasmore, 3 T. R. 199; State Bank v. State, 1 Blackf. 267; White v. Campbell, 5 Humph. 38; Bingham v. Weiderwax, 1 Comst. 509; 4 Bl. Com. 484; 2 Kent, Com. 307.

4. *Ibid.*

5. Edmunds v. Brown, 1 Lev. 237; Rex v. Pasmore, 3 T. R. 241, 242; Colchester v. Seaber, 3 Burr. 1866; Bank of Mississippi v. Wrenn, 3 Smedes & M. 791; 1 Bl. Com. 484; 2 Kent, Com. 307.

6. 2 Kent, Com. 307, 308; Ingraham v. Terry, 11 Humph. 572.

debts of a corporation, has in fact, become obsolete and odious. Practically, it has never been applied, in England to insolvent or dissolved moneyed corporations; and in this country its unjust operation upon the rights of both creditors and stockholders of this class of corporations, is almost invariably arrested by general or special statute provisions. Indeed, at this day it may well be doubted whether, in the view at least of a Court of Equity, it has any application to other than public and eleemosynary corporations, with which it had its origin.

Where a corporation has been dissolved, in England, the king may, either by grant,[8] or by proclamation under the great seal,[9] revive or renovate the old corporation, or by grant or charter create a new one in its place.[1] And the old corporation may be revived with the old or new set of corporators; and at the same time new powers may be superadded.[2] If the old corporation be revived, all its rights and responsibilities are of course revived with it; but if the grant operate as a new creation, the new corporation cannot be subject to the liabilities nor possess the rights of the old.[3]

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8. Rex v. Grey, 8 Mod. 361, 362; Rex v. Pasmore, 3 T. R. 199.

9. Newling v. Francis, 3 T. R. 189, 197, 198, 199.

1. Colchester v. Seaber, 3 Burr. 1870, 1 W. Bl. 591; Rex v. Pasmore, 3 T. R. 242; Scarboro' v. Butler, 3 Lev. 387; Luttrel's case, 4 Co. 87; Lincoln Bank v. Richardson, 1 Greenl. 79; Port Gibson v. Moore, 13 Smedes & M. 157; 2 Kyd on Corp. 516.

2. Rex v. Pasmore, 3 T. R. 241, per Kenyon, C. J.

3. Colchester v. Seaber, 3 Burr. 1866; Scarboro' v. Butler, 3 Lev. 287; Rex v. Pasmore, 3 T. R. 241, 242, 246; Luttrel's case, 4 Co. 87; Bellows v. Hallowell Bank, 2 Mason, 43, per Story, J.; Union Canal Co. v. Young, 1 Whart. 410; and see Smith v. Morse, 2 Calif. 524, 554.

ADAMS'S EQUITY.

INCLUDING PLEADING AND PROCEDURE.

ADAMS'S EQUITY

BOOK I.

OF THE JURISDICTION OF THE COURTS OF EQUITY AS REGARDS THEIR POWER OF ENFORCING DISCOVERY.

CHAPTER I.

OF DISCOVERY.

The jurisdiction of the courts of equity for the enforcement of civil rights derives much of its utility from **the power of the Great Seal to compel the defendant in a suit to discover and set forth upon oath every fact and circumstance within his knowledge, information, or belief,** material to the plaintiff's case. [1] **This right to enforce Discovery,** as it is called, **does not exist in the courts of common law.** In those courts the plaintiff must make out his case by the evidence of witnesses or the admissions of the defendant.[1]

The defendant, in his turn, **may require from the plaintiff, by a cross-suit, the like discovery** upon oath of all the circumstances within the plaintiff's knowledge. [2]

The Court of Chancery does not require the defendant to answer questions which, on grounds of general policy, he is entitled to resist.

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1. The English Supreme Court of Judicature Act of 1873 and the rules adopted in conformity therewith and various other statutes in England and the several states have so changed and enlarged the jurisdiction of the English and American courts, both at law and in equity, that a bill purely for discovery is now rarely, if ever, necessary. Parties may now be examined by virtue of these statutes both at law and in equity and the production and inspection of books, papers and documents procured. See 14 & 15 Vict., c. 99, sec. 2; 17 & 18 id., c. 125, secs. 51, 52; 36 & 37 id., c. 66, Schedule Rules of Procedure; Eaton on Equity, 632.

1. "**No man need discover matters tending to criminate himself, or to expose him to a penalty or forfeiture.**" He has a right to refuse an answer, not merely as to the broad and leading fact, but as to every incidental fact which may form a link in the chain of evidence, if any person should choose to indict him.[2] [3]

If the objectionable nature of the discovery asked appears on the bill, the protection may be claimed by **demurrer.** If the tendency of the question is not apparent on the bill, the defendant may take the objection by **a plea.** If the facts are such as to exclude both a demurrer and a plea, the privilege may be claimed by **answer**; and if the defendant states in his answer that he cannot give the information asked without affording evidence of his crime, he will not be compellable to give it.[3] [4]

The protection thus afforded to a defendant against being compelled to prove himself guilty of a criminal act, is subject to **modification in respect to frauds.** And it seems that an objection will not hold to discovery of a fraud, on the mere ground that it might be indictable as a conspiracy at law, unless there is an indictment actually pending, or at all events a reasonable probability that one will be preferred.[4]

There are other cases which have been termed exceptions to the doctrine, but which are in fact **instances to which its principle does not apply.** Such, for instance, are those **where the penalty has ceased by effluction of time, or where the plaintiff is alone entitled to the penalty, and expressly waives it by his bill**; or where what is called a penalty or forfeiture is in reality **mere stipulated damages** or cessation of interest. [5]

2. **No man need discover legal advice which has been given him by his professional advisers, or statements of facts which have passed between himself and them in reference to the dispute in litigation.** [6] The privilege exists, also, where the discovery is sought from the professional adviser.[5]

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2. Eaton on Equity, 633, 634; United States v. Saline Bank, 1 Pet. 100; Skinner v. Judson, 8 Conn. 528

3. See *post*, Equity, Book 4.

4. Skinner v. Judson, *supra*.

5. Eaton on Equity, 634. The same

3. **The third maxim of privilege protects official persons from disclosing matters of state, the publication of which might be prejudicial to the community.** [8]

The exceptions just considered are merely exceptions to the right of discovery. There is no rule that matters falling within their scope cannot be alleged in a bill; or that, if proved, they may not warrant relief. But the plaintiff must prove them for himself, and has no right to examine the defendant respecting them.

Subject to these exceptions, the rule respecting discovery is, that "every competent defendant in equity must answer as to all facts material to the plaintiff's case; he must answer to all, and not to a portion only, and he must answer distinctly, completely, and without needless prolixity, and to the best of his information and belief." As against an incompetent defendant discovery cannot be enforced, viz., against an infant, or lunatic without committee, or the Attorney-General when made a defendant on behalf of the crown.[6]

The first rule respecting discovery is, that **the defendant must answer to all facts material to the plaintiff's case.**

He is not bound to answer questions of law; for such questions ought to be decided by the court. [9] **He is not bound to answer questions of fact, unless reasonably material**; for he is not to be harassed with idle and perhaps mischievous inquiries. And, lastly, **he is not bound to answer merely because the question is material to the issue, but it must be also material to the plaintiff's case.**

This rule is embodied in the maxim that "**if a defendant answers at all, he must answer fully;**" and its meaning is, that if a defendant, instead of demurring or pleading to the bill, puts in an answer, and thus professes to take issue on the whole case, and to go to a hearing on the whole, he

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rule applies to interpreters between client and attorney. Parker v. Carter, 4 Munf. 273, and to communications between different solicitors, etc., of the same party. Goodall v. Little, 1 Sim. N. S. 155; but not to a student in a solicitor's office. Andrews v. Soloman, Pet. C. C. 356.

6. Micklethwaite v. Atkinson, 1 Coll. 173.

cannot deny a portion of the plaintiff's statement, and then allege that, in consequence of such denial, the rest of the discovery sought has become immaterial. [10] If he wish to insist on that point, he must protect himself by demurrer or plea, resting his defence on the statement in the bill or on a single independent issue. If he does not adopt that course, but goes to a hearing on the whole controversy, he must give discovery on all points, so that the plaintiff, if the decision be in his favor, may obtain a complete decree.[8]

The last rule is that **the defendant must answer distinctly, completely, without needless prolixity, and to the best of his information and belief.**[9]

His answer must be distinct, as containing a positive allegation of each fact, and not merely implying it by way of argument. And it must distinctly meet each specific question by a specific reply.

It must be complete, and so framed that the plaintiff can effectually make use of it. [11] The rule, however, will not be enforced to an oppressive extent.

It must be framed without needless prolixity. If, however, the matters inquired after be material to the defence, mere prolixity, such as setting out documents at length which might have been simply referred to, will not be dealt with as impertinence, although it may be attended with the risk of costs[1] [12]

It must be to the best of the defendant's information and belief.[2] And the information meant is not only that which he actually possesses, but that also which, either by inspecting his books, or by making inquiries of his solicitors or agents, or of others from whom he has a right to information, is fairly within his reach. Whatever means of information he has a right to possess, the court will look upon as being in his possession; and he must resort to proper means for enforcing his right.

A defendant is also bound, if required by the plaintiff, to set forth **a list of all documents in his possession,** from which discovery of the matters in question can be obtained; and if the possession of such documents and their character

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8. See *post*, Book IV.

9. Woods v. Morrell, 1 John. Ch. 103; Pettit v. Candler, 3 Wend. 618.

1. Parker v. Fairlee, 1 S. & S. 295.

2. Taylor v. Rundell, Cr. & P. 104.

as fit subjects of discovery can be shown from the answer, he must permit the plaintiff to inspect and copy them.[3]

The right of enforcing the production of documents exists for the purpose of discovery alone, and does not depend on, nor will be aided by, a title to possess the documents themselves. The right must be regulated by the same principles which regulate the right to discovery in the answer itself. [13] The right to production must be shown from admissions in the answer, and cannot rest on extrinsic evidence. [14] If the defendant does not admit their possession, or their relevancy to the plaintiff's case, the production cannot be enforced. The admissions necessary to compel production are, that the documents are in the defendant's possession or power, and that they are of such a character as to constitute proper matters of discovery within the ordinary rules.

In order to entitle the plaintiff to have a document produced, **it is sufficient to show that it is material to his own case.** [15] His right will not be excluded because it happens to be evidence for the defendant also.

If the possession and character of the documents are sufficiently admitted, the next step is to order their productions;[4] and unless some ground can be shown for refusing it, an order for that purpose is almost of course. [16] If the plaintiff's equity be effectually displaced by the answer, the mere technical rule that an answer must be full, does not apply to the production of documents. [17]

A defendant may in some cases bind himself by the frame of his answer to produce a document, which is evidence of his own title alone, and which does not contain, nor is alleged to contain, any evidence of the plaintiff's case. A mere reference to the document as existing, and as constituting a portion of his own evidence, will not expose him to this liability; but if he professes to set out its contents, or to give an abstract of it, referring for verification to the document itself, he will be considered to have made it sub-

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3. Rosevelt v. Ellithorp, 10 Paige, 415.

4. The books and papers called for must be described with reasonable certainty. Williams v. Williams, 1 Md. Ch. Dec. 201.

stantially a part of his answer; and if he admits possession, will be bound to produce it, in order that the plaintiff may ascertain that it is correctly stated.

The right of enforcing discovery on oath is confined to the plaintiff in the cause. If the defendant wishes, on his part, to obtain discovery, he must constitute himself a plaintiff by filing a **cross-bill**, and will be entitled in his turn to an answer on oath so soon as he has answered the original bill.[5]

The jurisdiction of the Great Seal for enforcing discovery is available in aid of proceedings for civil relief, whether such relief be asked from the Court of Chancery, or from another public tribunal in this country, which is itself unable to enforce discovery. [18] But discovery will not be enforced to aid a proceeding before arbitrators, or before an inferior court. Discovery has been enforced in one instance to aid the jurisdiction of a foreign court; but the propriety of such enforcements seems open to doubt.[6] [19]

In order to entitle himself to such discovery, the plaintiff must show a title to sue the defendant in some other court, or that he is actually involved in litigation with the defendant, or is liable to be so, and must also show that the discovery prayed is material to support or defend the suit. If he does not show this, he shows no title to the discovery.

Where the plaintiff alleges in his bill a sufficient case at law, it has been doubted **to what extent discovery can be resisted, by pleading matters which would be a defence at law.** The true principle appears to be that, if the legal defence is of a character showing that the discovery would have no bearing on the issue at law, it will be a sufficient answer to the bill. If the legal defence is not of this character, but the trial at law will be of the general merits, the discovery will be enforced.[7]

A bill thus filed for enforcing discovery in aid of proceedings before some other tribunal is called a bill for discovery, in contradistinction to those bills on which the

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5. See *post*, Book IV.

6. See Mitchell v. Smith, 1 Paige, 287.

7. March v. Davidson, 9 Paige, 580.

consequent relief is attainable in equity, and which are called **bills for relief**, or, more correctly, for discovery and relief. [20]

The discovery obtained by a bill in equity is only available against the answering defendant. It canot be read as evidence against a co-defendant, unless he refers to it by his answer as correct, or is so connected with the answering party as to be bound, under the ordinary rules of law, by his declarations or admissions.

As against the defendant himself, if he be not under incapacity, the answer is evidence. If the plaintiff does not reply to it, and thus give him an opportunity of verification by evidence, the whole answer must be taken as true. **If a replication be filed, the answer is not evidence in the defendant's favor, but the plaintiff may use any portion of it,** without admitting the remainder to be read, except so far as it is explanatory of the portion used. [21] The defendant, however, is so far entitled to the benefit of his answer, that any material suggestion made by it, though not established by proof, may, at the discretion of the court, be referred for inquiry. **And if a positive denial in the answer be met by the evidence of one witness only,** the court will neither make a decree nor send the question to a trial at law. If there are corroborative circumstances in the plaintiff's favor, the court will depart from this rule, and will either make an immediate decree, or, if the defendant desire it, will direct an issue, ordering his answer to be read as evidence on the trial, so that if may be contrasted with the testimony given against him.

The rule which allows a plaintiff who has replied to the answer to read selected portions only, is necessarily confined to cases where the hearing is in equity. If the bill be for discovery in aid of a procedure at law, the answer is treated at law like any other admission, and must be read throughout, if it be read at all.[8]

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8. Lyons v. Miller, 6 Gratt. 439.

CHAPTER II. [23]

ON COMMISSIONS TO EXAMINE WITNESSES ABROAD; OF PERPETUATION OF TESTIMONY AND OF EXAMINATIONS DE BENE ESSE.

In addition to the jurisdiction for discovery, there is another substantially similar to it, under which the Court of Chancery interposes for two objects: first, for the procurement of evidence to be used elsewhere, without itself deciding on the result, viz., in suits for a **commission to examine witnesses abroad,** and in suits to **perpetuate testimony**; and secondly, for granting, either in aid of its own proceedings or of a proceeding elsewhere, an **examination of witnesses de bene esse.**[1]

The jurisdiction for issuing commissions to examine witnesses abroad originated in the incapacity of the common law courts to issue such commissions without the consent of both parties. **That incapacity is removed by statute; but the jurisdiction of equity still continues,** though its exercise is less frequently required.

The jurisdiction in suits to perpetuate testimony arises where the fact to which the testimony relates cannot be immediately investigated at law, *e. g.*, where the person filing the bill has merely a future interest, or, having an immediate interest, is himself in possession and not actually disturbed, though threatened by the defendant with disturbance at a future time.[2] [24]

The jurisdiction to examine witnesses de bene esse is a jurisdiction for permitting evidence to be taken before the cause is regularly at issue, in cases where, from the age or illness of a witness, or from his being the only witness to an important fact, there is reason to apprehend that, before the regular opportunity arrives, material evidence may be lost. This is called an examination *de bene esse;* and **the**

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1. The perpetuation of testimony, and the examination of witnesses *de bene esse*, are now provided for and regulated by statute in the several states so that a bill for this purpose is no longer necessary. Eaton's Equity, 637-638.

2. Eaton's Equity, 636; Clark v. Bundy, 6 Paige, 432.

depositions taken under it can only be read if the party seeking the benefit of them has used all diligence to examine in the ordinary course, but there has been a moral impossibility of his so doing. The same course may be pursued where a similar danger exists in reference to an action at law; and a bill may be entertained for an auxiliary examination *de bene esse*, provided there be annexed to it an affidavit of the circumstances which render such examination necessary.[3]

The mode of taking the evidence, either under a commission to examine witnesses abroad, or in a suit to perpetuate testimony, or in an examination de bene esse, is in all material points similar to that adopted in the ordinary examination in a cause. [25]

In a suit, however, to perpetuate testimony, the cause does not proceed beyond the examination of the witnesses. When that has been completed, it is considered at an end; and the only remaining step is the publication of the evidence. This is effected by an order of the court; but such an order cannot be obtained except for the purpose of a suit or action, nor even for that purpose during the lifetime of the witnesses, unless on special grounds, showing that their examination is morally impossible.

The same principle applies to depositions taken de bene esse; and their publication cannot be obtained unless the witness dies or is otherwise incapacitated from giving his evidence before issue is joined.

If the evidence is required for the purpose of a trial at law, the order made is that the depositions be published, and that the officer attend with and produce to the court of law the record of the whole proceedings, and that the parties may make such use of the same as by law they can.

3. Eaton's Equity, 637.

BOOK II.

OF THE JURISDICTION OF THE COURTS OF EQUITY IN CASES IN WHICH THE COURTS OF ORDINARY JURISDICTION CANNOT ENFORCE A RIGHT.

CHAPTER I. [26]

OF TRUSTS, BOTH ORDINARY AND CHARITABLE.

The jurisdiction of equity to grant relief originates in the occasional inadequacy of the remedy at law: 1. Where the courts of ordinary jurisdiction cannot enforce a right; and 2. Where they cannot administer it.

The equities under the first head of this division, viz., **where the courts of ordinary jurisdiction cannot enforce a right,**[1] are those for **performance of trusts and contracts,** for **election** between inconsistent benefits, for **completion of gifts on meritorious consideration** in favor of the donor's intention after his death, for **giving effect to discharges by matter in pais of contracts under seal,** for **relief against penalties** and forfeited mortgages, for **re-execution or correction of** instruments which have been lost or erroneously framed, for **rescission** of transactions which are illegal or fraudulent, or which have been carried on in ignorance or mistake of material facts, and for **injunction** against irreparable torts.

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1. See, generally, Eaton's Equity, 11-18.

Separate courts of law and equity were abolished in England by the Supreme Court of Judicature Act (already cited, *ante*), in 1873. They have also been abolished or rather both jurisdictions are administered by one tribunal in New York and many other states.

The jurisdictions of law and equity are still administered in different courts or in different branches of the same court in the United States courts, in Alabama, Delaware, Illinois, Michigan, New Jersey, Mississippi, Tennessee and probably a number of other states.

Although separate courts of equity may not exist as such in England and some of the states, the jurisdictions survive both in England and the United States. See, generally, Eaton's Equity, 18-25.

The jurisdiction to enforce performance of trusts arises where property has been conferred upon, and accepted by, one person, on the terms of using it for the benefit of another. [27] The former person, or owner at law, is called the **trustee**; the latter, or owner in equity, the **cestui que trust.**[2]

In so far as a legal ownership is conferred, it invests the trustee with absolute dominion at law, and the equitable ownership, or right to compel performance of the trust, is only cognizable in the Court of Chancery.

In order to originate a trust, two things are essential: first, **that the ownership conferred be coupled with a trust,** either declared by the parties or resulting by presumption of law; and secondly, **that it be accepted on those terms by the trustee.**[3]

The declaration of a trust by the parties is not, independently of the statute of frauds, required to be made or evidenced in any particular way.

With respect to real estate, it is enacted by the statute of frauds, "that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect." [28] And further, that "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise."[4]

This act does not require that the trust shall be declared in writing, but only that it shall be manifested and proved by writing. And, therefore if the existence of a trust, together with its precise terms and subject-matter, can be proved from any subsequent acknowledgment, written and signed by the trustee, as by a letter, memorandum, or recital in a deed, it will be sufficient.[5]

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2. See Eaton's Equity, 346 *et seq.*, for several definitions of a trust.

3. Eaton's Equity, 361.

4. Similar statutes exist in most of the states. Eaton's Equity, 361, 362; Perry on Trusts, § 78 and note.

5. Eaton's Equity, 362 and cases cited.

With respect to personal estate, including moneys out on mortgage, the original rule continues, and it is sufficient that, either by writing or by word of mouth, there should be a certain declaration of the trust.[6]

The intention thus evidenced, whether by writing or by parol, to impose a trust on the donee, **must be declared with certainty**; and there must also be a certain declaration of its terms, viz., of **the property** on which the trust is to attach, **the parties** for whom the benefit is meant, and **the interests** which they are respectively to take.[7] [29] If there be uncertainty in this latter respect, but it be sufficiently certain that a trust was meant, and not a gift for the donee's benefit, the case will fall under a different rule, and there will be **a resulting trust** for the donor by operation of law.

The creation of trusts in the form of powers occurs where no positive direction is given that the trustee shall hold for the parties interested, but he is authorized to give them an interest if he see fit. Such a power as this does not necessarily constitute a trust; for it may be absolutely discretionary in the donee, and one which he cannot be compelled to execute; but, on the other hand, it may be given him in a different character, and as one which he is intrusted and bound to execute. If the context of the gift establish this latter construction, he has not a discretion whether he will execute his power or not, but if he neglect his duty, the court will, to a certain extent, discharge it in his stead. It will not, however, in so doing, assume an arbitrary discretion, although such a discretion may have been given to the trustee, but it will adopt such general maxim as under the circumstances appears applicable, *e. g.*, that a fund given for the benefit of "relations" shall be distributed among those who are within the statute of distributions, although the donee might have selected out of a wider class.[8]

The use of precatory or recommendatory words is not

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6. Id, 361. Of course, if the trust is a testamentary one, it must be created by a will duly executed. Id.

7. Id., 365; Steere v. Steere, 5 John. Ch. 1.

8. See Brown v. Higgs, 8 Ves. 561; Gibbs v. Marsh, 2 Met. 243.

unfrequent in wills; and we often meet with such expressions as "I recommend," "I entreat," or "I desire," that such a thing be done, or "I have no doubt, or well know," that it will be done. [30] In these cases the mere grammatical construction of the words is not sufficient to determine whether a trust exists; but **the question in each particular case is merely of construction on the terms of the instrument.**[9] [31]

The non-creation of a trust in the donee, notwithstanding that a trust is formally declared, occurs principally in conveyances for payment of debts, where the language used, if taken in its literal acceptation, would constitute the creditors cestuis que trustent, and would entitle them to enforce an application of the fund. It has been decided, however, that, notwithstanding the similarity of form, the transaction is substantially different from the creation of a trust; and that a man who, without communication with his creditors, puts property into the hands of a trustee for the purpose of paying his debts, proposes only a benefit to himself, and not to his creditors. The nominal trustee, therefore, is merely his agent; and the nominal trust is only a method of applying his own property for his own convenience.[1]

A resulting trust by presumption of law arises where the legal ownership of property has been disposed of, but it is apparent from the language of the disposition itself, or from the attendant circumstances, that the equitable ownership or beneficial interest was intended to go in a different channel, although there is no declaration, or no sufficient declaration, as to what that channel should be. In this case a trust is implied for the real owner, termed a resulting trust, or trust by operation of law. And such a trust, although relating to real estate, is **exempted by a proviso**

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9. Wright v. Atkins, 17 Ves. 255; Erickson v. Willard, 1 N. H. 217; Eaton's Equity, 368 *et seq.*

1. Garrard v. Lord, 1 Sim. 1. But in this country, the creditors on learning of the existence of the deed of assignment may claim the benefit thereof, and enforce it in equity, even if they are not parties to the conveyance, and had no knowledge of it at the time it was made. See Moses v. Murgatroyd, 1 John. Ch. 119; Pratt v. Thornton, 28 Me. 355.

in the statute of frauds from the necessity of being declared or evidenced in writing.[2]

Resulting trusts of the first class, viz., those where the intention to sever the legal and equitable ownership is apparent, either directly or indirectly, from the language of the gift, occur for the most part in dispositions by will. [32] They are not necessarily restricted to such dispositions, for whenever, in any conveyance or disposition of property, it is apparent that any beneficial interest was not intended to accompany the legal ownership, but no other sufficient and effectual gift of it has been made, it will result back to the original owner. But in gifts by deeds, which are generally made with full deliberation and under professional advice, this circumstance does not often occur. In gifts by will it is not unfrequent. In all cases of this kind the rule of law is, that **the beneficial interest undisposed of results back to the original owner, or to his representatives,** real or personal, according to the nature of the property.[3] [33]

Resulting trusts of the second class, viz., where the intention to sever the legal and equitable ownership is apparent from the attendant circumstances, occur where an estate has been purchased in the name of one person, and the purchase-money or consideration has proceeded from another. In this case the presumption of law is, that the party paying for the estate intended it for his own benefit, and that the nominal purcheser is a mere trustee. This presumption exists in all cases where the conveyance of a legal estate is made to one who has not really advanced the price.[4]

As trusts of this kind are expressly exempted from the statute of frauds, **it is competent for the real purchaser to prove his payment of the purchase-money by parol evidence,** even though it be otherwise expressed in the deed. [34]

The doctrine, however, is merely one of presumptive evidence. It is not a rule of law that a trust must be in-

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2. Eaton's Equity, 398 *et seq.*
3. Id.; Hawley v. James, 5 Paige, 323.
4. Boyd v. McLean, 1 John. Ch. 582; Eaton's Equity, 399.

tended on such a purchase, but it is a reasonable presumption, as a matter of evidence, in the absence of proof to the contrary. It is therefore open to the nominal purchaser to rebut that presumption by direct or circumstantial evidence to the contrary.

The most important class of cases in which, as an ordinary rule, a counter presumption arises, are those where a purchase has been made in the name of a child, or of one towards whom the party paying the money has placed himself in loco parentis, [35] in which case there is a *prima facie* presumption that it was intended as a provision or advancement.[5]

In accordance with the same principle, **if land is acquired as the substratum of a partnership, or is brought into and used by the partnership for partnership purposes, there will be a trust by operation of law for the partnership, as tenants in common,** although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or, if in all, may apparently be in them not as partners but as joint tenants.[6]

Another class of cases, in which the circumstances give rise to the presumption of a resulting trust, is **where a man, whose duty it was to create a trust, has done an ambiguous act,** and the court construes such act as having been done in accordance with that duty. If, therefore, a man is a trustee of certain funds for investment in land, or has bound himself by covenant to lay out money in land, and he purchases an estate at a corresponding price, it will be presumed, independently of positive evidence, that his object in the investment was to effectuate the trust; and a trust may be implied accordingly. [36] This, however, is not a hostile or compulsory decree, but on the supposition that such a result was really contemplated; and, therefore, if the contrary be proved, as by showing that the purchase was made under a mistaken opinion of the trust, the presumption cannot be raised. It is otherwise if the covenant be to settle such land as the covenantor may have on a specified day, or to purchase a specific estate, which he afterwards

5. Eaton's Equity, 409.

6. Dale v. Hamilton, 5 Hare, 382.

acquires; for in these cases the trust attaches by virtue of the covenant, independently of any intention in the party bound.[7]

The second requisite to the creation of a trust is that the ownership be accepted on the proposed terms. The effect, however, of non-acceptance is not to invalidate the beneficial gift, but merely to free the non-accepting party from the liability to act. **A trust shall not fail for want of a trustee**; and, therefore, whether a trustee has been named, who afterwards refuses the trust; whether, as is often the case in wills, no trustee be named, or it is doubtful who is the proper trustee; or whether, from any other cause, there be a failure of a regularly appointed trustee, the Court of Chancery will see to the execution of the trust. **It will ascertain in whom the legal ownership is vested, and will declare him a trustee for the purposes of the gift, or will nominate, if required, a trustee of its own,** to whom the estate may be conveyed.[8]

If, however, there is not merely a failure of the specific trustee, but the estate derived from the donor is at an end, and there is an owner holding by a paramount or adverse title, the trust ceases to bind. It is binding on the trustee himself if he accept it, and on any parson claiming through or under him, except a purchaser for value without notice of the trust. And if he do not accept it, it is in like manner binding on those who take in his stead under the donor. But it is not binding on an adverse claimant making title by a *bona fide* disseisin of the trustee.[9]

The acceptance of a trustee may be direct, by execution of the trust deed, or by a statement that he accepts the trust; **or it may be implied** from any act which shows an intention on his part to deal with the property, and to act in the execution of the duties imposed.[1] [37] **And in like manner his renunciation may be evidenced by his conduct,** without an express declaration to that effect. But the

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7. Tooke v. Hastings, 2 Vern. 97; Perry v. Philips, 4 Ves. 108.

8. Sheppard v. McEvers, 4 John. Ch. 136.

9. See Wodd v. Farmere, 7 Watts, 382.

1. Urch v. Walker, 3 M. & C. 702.

more prudent course is to execute a deed of disclaimer.[2] If the legal ownership has become vested in him, so that he cannot get rid of it by mere disclaimer, *e. g.*, on a descent to him as heir, he must convey to a new trustee under the sanction of the court, but is not bound to do any further act. [38]

A trustee after acceptance cannot divest himself of his trust except in three ways, viz.: 1. **By assent of all his cestuis que trust;** 2. **By means of some special power in the instrument creating the trust;** and 3. **By an application to the Court of Chancery.**[3]

If all the cestuis que trust are of full age and free from disability, there is no difficulty on the subject; for their sanction will necessarily secure the trustee. But if there are **infants or femes coverte** interested, or if there is a trust for **children not in esse,** or if for any other reason the sanction of all cannot be obtained, then the mere act of transfer would be a breach of trust; and therefore the trustee cannot, by his own act, relinquish his office, but would incur an additional liability for any misconduct on the part of his transferee. In order to meet this inconvenience, it is usual in all settlements, the trusts of which are likely to last for any length of time, to introduce a **clause, authorizing the retirement of existing trustees** and the nomination of new ones, with such provisions against misuse of the authority as may be considered expedient. If no such authority be given, or if the trustee is unwilling to exercise it, he can only be **denuded of his office by a decree in equity.**[4] If he has a sufficient ground for retiring, the costs of a suit for that purpose will be paid out of the estate; as, for instance, if he becomes involved in complicated questions, which could not have been anticipated when he undertook the trusts; but he cannot burden the estate with costs occasioned by a capricious abandonment of his charge.[5] [39]

So soon as the creation and acceptance of a trust are

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2. See Stacy v. Elph, 1 M. & K. 195; Judson v. Gibbons, 5 Wend. 224.

3. Cruger v. Halliday, 11 Paige, 314.

4. Id.

5. Id.

perfected, the property which it affects is subjected to a double ownership: an equitable ownership in the *cestui que trust,* and a legal ownership in the trustee. [40]

The equitable ownership or interest of the cestui que trust is in strictness a mere chose in action, or right to sue a *subpoena* against the trustee. **But it is considered in equity the estate itself, and is generally regulated by principles corresponding with those which apply to an estate at law.**

1. **The terms in which a trust is declared are interpreted by the ordinary rules of law.**[6] The declaration of **an executed trust,** *i. e.,* a trust of which the scheme has in the outset been completely declared, will bear exactly the same construction as if it had been a conveyance of the legal estate. If the scheme has been imperfectly declared in the outset, and the creator of the trust has merely denoted his ultimate object, imposing on the trustee or on the court the duty of effectuating it in the most convenient way, the trust is called **executory,** and is construed by a less stringent rule.[7] The language used is treated by the court as indicating the mere heads of an arrangement, the details of which must be ascertained from general usage.

2. **The equitable ownership is subjected to the same restraints of policy as if the legal estate were transferred.** [42]

It cannot, for example, in the case of real estate be enjoyed by an alien; it cannot be made incapable of alienation by the owner, or be denuded of any other right incidental to ownership; nor can it be settled in a series of limitations extending, or which may extend, beyond the limits of perpetuity, viz., a life or lives in being, and twenty-one years afterwards.[8] [43]

The rule, however, which subjects equitable estates to the same restraints of policy as if they were legal, admits of **two singular exceptions, both having reference to married women;** the one in what are called the separate use and pin-

6. Trotter v. Blocker, 6 Porter, 269.

7. Eaton's Equity, 379.

8. 1 Jarman on Wills, c. 14, sec. 2; Leggett v. Dubois, 5 Paige, 114; Rochford v. Hackman, 9 Hare, 475.

money trusts, the other in what is called the wife's equity for a settlement.

The effect of the separate use trust is to enable a married woman, in direct contravention of the principles of law, to acquire property independently of her husband, and to enter into contracts and incur liabilities in reference to such property, and dispose of it as a *feme sole,* notwithstanding her coverture and disability at law. This gift of a separate estate, whether for life or for an absolute interest, may be fettered and qualified by prohibiting anticipation or alienation. [44] The separate use trust is, however, so far bound by the policy of the law that it must contemplate the wife's continuance with her husband. **If it be framed with a view to future separation, it is invalid. A deed, however, which contemplates an immediate separation, and makes a separate provision for the wife, with a view to that object, may be sustained and enforced,** notwithstanding that its primary object — the separation itself — is incapable of enforcement by either party.

In order to create a separate trust, it is not sufficient that there be a gift for the wife's benefit, or a direction to pay the money into her own hands; [45] **but there must be a direction that it shall be for her sole, separate, or independent use,** or in other equivalent terms showing a manifest intent to exclude the husband. In like manner, **in order to create a fetter on anticipation, there must be positive words, or a manifest intention to restrain that power of disposal which is prima facie incidental to ownership.**

In the absence of any fetter on anticipation, the wife has the same power over her separate property as if she were unmarried. Her disability to bind herself or her general property is left untouched; but she may pledge or bind her separate property, and the court may proceed *in rem* against it, though not *in personam* against herself.[9]

The pin-money trust is so far similar to that for separate use, that in both cases the property subject to the trust is

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9. See 2 Kent's Com. *162. See modern statutes on the subject of married women in the several states.

placed at the wife's sole disposal, independent of her husband's control. [46] But in one respect the two trusts are essentially different: the one places the property at her absolute disposal for any purpose which she may select; the other **secures to her an income during the coverture, to be specifically expended in her dress and personal expenses,** lest the husband should refuse her an adequate allowance. It is a fund, therefore, which she is not entitled to accumulate.[1]

Alimony is not separate estate, but a mere provision for maintenance from day to day, decreed by a competent court to a wife legally separated from her husband, and is subject, in respect to its amount, continuance, and mode of payment, to the discretion of the Ecclesiastical Court.[2] [47]

The wife's equity for a settlement attaches on her equitable chattels real, and on such of her equitable choses in action as are capable of being immediately reduced into possession, and it authorizes a restraint of the husband's right, until he shall have made an adequate settlement.

In order to exclude the wife's right of survivorship, the husband must **assign her chattel real,** and must **reduce into possession her chose in action. And if he can effectuate this by course of law, there is no equity to restrain him.** [48] **Where the wife's interest is equitable, instead of legal, the trustee or holder of the property may transfer it without suit to the husband, and will not be responsible for so doing. But if he refuses to do so, or a bill be filed on the wife's behalf to prevent him, so that the property is brought within the control of the court, and the assistance of the court is required to give any benefit in it to the husband or his assignee, the husband shall not have it, unless he makes or has already made an adequate provision for his wife and children. This is termed the wife's equity for a settlement.** It is unaffected by any act or assignment of the husband; and the only mode by which it can be barred, is by the wife's personal waiver in court on examination

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1. See next note, *supra*.

2. This jurisdiction in this country is usually vested in courts exercising equity powers. Consult the local statutes.

apart from her husband. **If the chose in action be one which the husband cannot reduce into present possession,** as if it be to take effect after the coverture, or on the determination of an existing life estate, the wife is entitled to the whole, notwithstanding her marriage, and there is no interest in the husband on which the equity can attach.[3]

The equity, though called that of the wife, is **effectuated by a settlement on her children also,** and the wife cannot separate their interest from her own, or claim a setlement on herself to their exclusion. **Their right,** however, though inseparable from hers, **is merely incidental,** and does not constitute an independent equity. [49]

3. **The equitable ownership is governed by the same laws of devolution and transfer as the legal one.**

A trust of realty is not, however, liable to escheat.[4] [50] **If the line of descent fails by the death of the** *cestui que trust* without heirs, the trustee will have the enjoyment as the legal owner, for there is no one who can sue a *subpoena* against him. **Where a trust of land is declared for an alien, the crown is entitled,** as in the case of a legal estate; for the incapacity of an alien is not an incident of tenure, but a result of public policy, which disables an alien from purchasing except for the king's use. [51] **In the case of chattels,** whether real or personal, the doctrine of escheat has no place, but if the *cestui que trust* die intestate and without leaving next of kin, his interest vests in the crown as *bona vacantia,* and if he be convicted of treason or felony, it has always been deemed forfeitable to the crown.

The subjection of equitable estates to the legal rules of devolution and transfer admits of two exceptions: the one real, in their **exemption from dower;**[5] the other apparent, in **the attendance of satisfied terms on the inheritance.**

It frequently happens that long terms of years are created in real estates for securing moneys lent on mortgage, for raising jointures and

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3. See, generally, Ewell's Lead. Cases (1st Ed.), Coverture.

4. *Quaere* in the United States. See Matthews v. Ward, 10 Gill & John. 443; 4 Kent's Com. *425. Consult the local statutes.

5. Stevens v. Smith, 4 J. J. Marsh. 64. See, however, the local statutes.

portions for children, and for other special trusts, and that after the fulfilment of the trust, the terms continue in existence. [52] The trust of the term, under these circumstances, is not for any individual person, but for the owner of the inheritance, whoever he may be. And the trust of such attendant term will follow the descent of the inheritance, and the conveyances, assurances, and charges of the owner.[6]

The means by which an equitable ownership is transferred or changed, where its subject-matter is personal estate, are analogous to those which apply to a legal ownership, rather than strictly identical with them. [53] The distinction originates in the doctrine that personal property passes at law by mere delivery, which where an equitable interest is transferred, may not be practicable; and therefore in order to pursue as nearly as possible the analogy of law, it is required that the assignment of an equitable interest should be perfected by notice to the trustee, so as to deprive the assignor of subsequent control, and to effect a constructive delivery to the assignee.[7] It is otherwise with respect to real estate; for real estate passes by title, and not by delivery, and the character of the grantor's interest, whether legal or equitable, does not affect the terms of his deed.

The principle of constructive delivery by notice to the trustee is applied also to a debt or other chose in action. If it be in substance a right of property, it is treated in equity as of that character, and may be transferred by an assignment or agreement to assign perfected by notice to the party liable; [54] if the right is not substantially a title to property, but a mere litigious right, as for instance, the right of action for a personal wrong, or for suing in equity to redress a fraud, it cannot be made the subject of assignment.

The regular mode of tranferring a debt is by an instrument purporting to assign it, accompanied by a power of attorney to sue in the name of the assignor, and followed

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6. Not applicable to the United States.

7. There is a conflict in the United States on this question. See Adams's Equity, *53, note. See, generally, as to the equitable doctrine of notice, Eaton's Equity, 122 *et seq.*

by notice to the party from whom the assignor is to receive payment. There is not, however, any special form necessary, but any declaration, either by writing or word of mouth, that a transfer is intended, will be effectual, provided that it amount to an appropriation to the assignee; for inasmuch as the fund is not assignable at law nor capable of manual possession, an appropriation is all that the case admits.[8]

Possible and contingent interests are also to a certain extent assignable in equity, on the same principle as choses in action.[9] There is, however, a distinction between choses in action and possibilities in personalty with respect to the completion of an equitable transfer. [55] In the case of choses in action, the transfer may be completed by a constructive delivery; but in the case of possibilities, the interest, though a substantial one, is for the time being non-existent, and there are no means of perfecting the possession by notice or otherwise, but the contract remains *in fieri* until the contingency determines.

The legal ownership of the trustee confers on him at law an absolute dominion, but is considered in equity as subservient to the trust.

A trustee is bound to use his legal dominion for those purposes, and those only, which were contemplated by the grantor.

A trustee is bound to account for and protect the property whilst his trust continues. [57] It is one of his principal and most important duties that **he should keep regular and accurate accounts,** clearly distinguishing the trust property from his own, and showing all his receipts and payments in respect of it, and that he should be always ready to produce those accounts to his *cestui que trust.*

He should also **protect the property confided to him** whilst the trust continues, and should for that purpose retain the control of it in his own hands. A trustee, however, is not necessarily precluded from acting by the agency of

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8. Gardner v. Lachlan, 4 M. & C. 129.

9. See Varick v. Edwards, 1 Hoff. Ch. 382. Consult local statutes as to assignment of choses in action.

others, where such a mode of acting is according to the ordinary course of business.

A trustee is also prohibited from supinely leaving the control of the trust estate to his co-trustees; [58] for when several trustees are appointed, the property is committed to the charge of all, and the *cestui que trust* is entitled to the vigilance of all.[1]

It is not meant that in every act done under the trust every trustee must actively interfere, for such a course would be practically impossible; and it is therefore the ordinary doctrine of the court, that **trustees are responsible for their own acts only, and not for those of each other.**[2]

If in any case there is a bona fide doubt as to the course which, under the circumstances, a trustee should pursue, he may obtain directions by a suit in equity at the cost of the estate. [59]

When the trust is at an end, the trustee is bound to restore the estate to the parties entitled, and for that purpose to make such conveyance as they may require, receiving from them a release of his trust.

Lastly, **a trustee must not avail himself of his fiduciary character for any object of personal benefit.**[3] If, therefore, a trustee or executor buy in charges on the estate for less than their actual amount, the purchase will inure for the benefit of the trust. Where a trustee for sale or purchase attempts to buy from, or sell to, himself, it is not necessary to show that he has in fact made an improper advantage; but the *cestui que trust*, if he has not confirmed the transaction with full knowledge of the facts, may at his option set it aside. [60] The rule, however, which imposes this absolute incapacity, applies to those cases only where a trustee attempts to purchase from, or sell to, himself. **There is no positive rule that he cannot deal with his cestui que trust. But in order to do so, he must fully divest himself of all advantage which his character as trustee might confer,** and

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1. See, generally, as to duties of trustees, Eaton's Equity, 420 *et seq.*

2. Eaton's Equity, 431. A trustee is liable for the acts or defaults of his co-trustee in which he has participated or permitted or aided by his negligence. Id.

3. Id., 429.

must prove, if the transaction be afterwards impugned, that it was in all respects fair and honest. [61][4]

The restraint on any personal benefit to the trustee is not confined to his dealings with the estate, but extends even to **remuneration for his services**, and prevents him from receiving anything beyond reimbursement of his expenses, unless there be an express contrary stipulation.[5] So far as such **reimbursement** extends, he is entitled to claim it in the fullest extent.[6]

If a trustee fail in performance of his trusts, whether by exceeding or falling short of its proper limits, the cestui que trust is entitled to a remedy in equity. If there be an existing and acting trustee who either refuses to perform a particular duty, or threatens to do an unauthorized act, he may be compelled to act in the one case, or restrained in the other; or, if necessary, he may be removed altogether from the trust, and another appointed in his room.[7]

If a breach of trust has been committed, the trustee will be liable to make good any consequent loss, whether immediately resulting from it or traceable as its effect. [62] And if several trustees have concurred in its commission, each of them will, in favor of the *cestui que trust*, be severally liable for the whole loss. But if no actual fraud has been committed, a **contribution** may be enforced as between themselves. And if any third party has knowingly reaped the benefit of the breach of trust the loss may be eventually cast on him. **If the cestuis que trustent themselves, being sui juris, have consented to the act, they cannot afterwards be heard to complain of it.**

Unless there be acquiscence in the cestuis que trustent, the mere lapse of time will not bar the liability of an express trustee, for his possession is according to his title. It is otherwise with regard to persons who, not being themselves express trustees, have acquired property with notice

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4 *Ex parte* Lacy, 6 Ves. 625; Child v. Brace, 4 Paige Ch. 309; Eaton's Equity, 429.

5. In this country, trustees are usually allowed a compensation for their services. Eaton's Equity, 433.

6. Eaton's Equity, 433.

7. See Adams's Equity, *37, note.

of a trust, or have otherwise become trustees by construction of equity.

The extent of the remedy which equity affords depends on the character of the wrong done. [63] There does not appear to be any case where the court has awarded damages for mere injury to the estate; but **the trustee must account**[8] **for what he has or ought to have received with interest** on moneys improperly retained. The giving of interest, however, is merely an imperfect method of estimating the indemnity which the *cestui que trust* may claim, and does not preclude the adoption of a more accurate rule, if one exists.

If an improper investment has been made, it is considered, as against the trustee himself, equivalent to no investment. But in favor of the *cestui que trust*, it gives an option to claim either the investment made, or the replacement of the original fund with interest, according as the one or the other may be most for his benefit. [64]

Where the improper application of trust funds has produced an ascertainable profit, —as, for example, where the trust money has been applied either solely or as mixed up with other property belonging to the trustee, in carrying on a trade or other speculation,—**the cestui que trust is entitled to claim the profits.** And with this view he may insist on an account of the profits made, so that after they have been ascertained he may have an option to accept either the amount realized, or interest.[9]

Besides the ordinary trusts just considered, there is another class of trusts, those for charitable and public purposes, where the legal ownership is conferred on a fiduciary holder, but the trust is declared for general objects, and not for the benefit of a specific owner. [65]

The meaning of the word charity, as applied to a trust, is different from any signification which it ordinarily bears. The word in its widest sense denotes all the good affections which men ought to bear towards each other; in its most

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8. See, as to trustees' accounts, Eaton's Equity, 435.

9. See, generally, as to breaches of trust and the remedies therefor, Eaton's Equity, 439 *et seq.*

restricted and most usual sense, relief of the poor. In neither of these senses is it employed by the Court of Chancery, but a signification has been affixed to it, derived for the most part from the enumeration given in **the statute of charitable uses, 43 Eliz. c. 4.**[1] **And the purposes enumerated in that act, together with others anologous to them, are accordingly considered as the only charities which the court will recognize.**

The purposes enumerated in the statute as charitable are "the relief of aged, impotent, and poor people; the maintenance of maimed and sick soldiers and mariners; the support of schools of learning, free schools, and scholars of universities; repairs of bridges, etc.; education and preferment of orphans; the relief and maintenance of houses of correction; marriages of poor maids; help of young tradesmen, handicraftsmen, and persons decayed; redemption or relief of prisoners or captives; and the aid of poor inhabitants concerning payment of fifteenths, setting out of soldiers, and other taxes." These are the only uses which the statute in term reaches, but it is not necessarily confined to them; and **gifts not within its letter have been deemed charitable within its equity.** Such, for instance, are gifts for religious or educational purposes, for the erection of a hospital or a sessions house, or for any other beneficial or useful public purpose, not contrary to the policy of the law.[2] **But a gift merely for useful or benevolent purposes, without specifying what the purposes are, does not constitute a gift to charity**; because there may be many useful or benevolent purposes which the court cannot construe to be charitable; a gift also to mere private charity is not within the analogy of the statute; and although there are cases where the court has apparently interfered in favor of private charity, yet such cases have in fact been those not of gifts to charitable purposes, but of gifts to individuals with a benevolent pur-

1. This statute has been adopted in some of the United States, and rejected in others. The jurisdiction is, however, held to exist independently of the statute. Eaton's Equity, 386.

2. See definition in Jackson v. Phillips, 14 Allen, 556, per Gray, J.; Eaton's Equity, 386.

pose. Such, for example, would be a gift to "poor relations."

In order to create a public or chaitable trust, **it is not necessary that the property on which the trust attaches should be derived from private bounty.** [67]

Trusts for chaitable purposes, equally with those for individual benefit, **must be of a character not prohibited by the policy of the law.**[3] A trust, therefore, to promote religion must not be directed to what the law calls **a superstitious use,**[4] as, for example, the maintenance of a priest to pray for the soul of the donor. If such a trust be created in terms which show that the illegal object alone was contemplated, the gift will be simply void. **If it appears that charity was the object contemplated, the illegality of the particular method will not exclude some other application;** but the fund will be at the disposal of the crown, to be applied under the sign manual for some lawful object. [68]

The incidents of a trust for charitable purposes are for the most part the same as those of an ordinary trust. The principal points of distinction are, first, that **a charitable trust is not affected by lapse of time** in the same manner as a trust for private persons; and secondly, that **where an apparent charitable intention has failed, whether by an incomplete disposition at the outset, or by subsequent inadequacy of the original object, effect may be given to it by a cy pres or approximate application,** nothwithstanding that, if it were an ordinary case, the trust would be void for uncertainty, or would result to the donor or his representative.[5]

I. **If the trustees of a charity have bona fide mistaken the right mode of application,** and have actually disbursed the funds in accordance with that mistake, and without

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3. Eaton's Equity, 375.

4. It has been held that there are no superstitious uses in the United States. Methodist Church v. Remington, 1 Watts, 218; Goss v. Wilhite, 2 Dana, 170.

The Statutes of Mortmain are not generally in force in this country. 2 Kent's Com. *282; Vidal v. Gerard, 2 How. 187.

5. The doctrine of *cy pres* (which means "near," "next to," "as near as may be"), has been adopted in some of the United States and rejected in others. See Eaton's Equity, 393 *et seq.*

notice of the objection, the disbursements shall not be disallowed; and although the mere length of an erroneous usage cannot alter the orignal trust, yet where trusts have been imposed on colleges or other existing corporations who are under no obligation to accept them, traditional usage may be allowed an effect which in ordinary cases it might not possess. [69]

II. Under this head two doctrines appear to be established, viz: I. **If in a gift to charity an intention be manifested of appropriating the entire fund, it will be effectuated, to the exclusion of a resulting trust,** notwithstanding that the gift actually made is of a portion only. [70]

2. **If in a gift to charity the intended object to be not specified at all, or not with sufficient certainty, or if it cease to exist, or to afford the means of applying the entire fund, the presumed general object will be effectuated by an application cy pres;** i. e., an application to some other purpose, having regard as nearly as possible to the original plan. [71] It is, however, a mere presumption of law; and, therefore, if it appears from the wording of the instrument that the individual charity was the only one in the donor's mind, and that, if that should fail, he intended the property to revert to himself, there is no equity to alter his disposition.

The manner in which the sy pres application is effected, is by referring it to the master to settle a scheme, having a regard to the instrument of gift.[6]

The jurisdiction to superintend a charitable trust is set in motion by the information of the Attorney-General suing on behalf of the crown, or if the nature of the trust is such that its non-performance has inflicted personal injury on an individual, then by a compound form of suit uniting both the public and the private wrong, and called an information and bill. [74] **So far as its exercise is required for controlling the management of the property, it extends to all charities,** whether corporate or not, **and is regulated by the same principles as in the case of ordinary trusts.**

So far as the jurisdiction is sought to be exercised for

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6. See examples in text, page *71 *et seq.*

directing the internal administration of the charity, and determining the manner in which the funds shall be applied, it is confined to charities at large, *i. e.*, such charities as have no charter of incorporation, but are under the management of private persons, or of some independent corporation, in whom, as trustees, their property is vested.

In the case of eleemosynary corporations, the jurisdiction of equity is confined to the management of the estate, and does not extend to the election or amotion of corporators, or to the internal adminstration of the charity. The proper jurisdiction for these purposes is that of the visitor. If the visitor refuses to hear and decide a dispute, he may be compelled to do so by *mandamus;* but his decision cannot be controlled. If, however, the visitors are also in receipt of the revenue, so that they are in fact trustees, subject to no independent control, the jurisdiction of equity will attach; and the same result will follow when the object sought is beyond the visitor's functions, such, for instance, as a new apportionment of the charity revenues.[7] [75]

7. *Ex parte* Wangham, 2 Ves. Jr. 609.

CHAPTER II. [77]

OF SPECIFIC PERFORMANCE.—ELECTION.—MERITORIOUS OR IMPERFECT CONSIDERATION.—DISCHARGE BY MATTER IN PAIS OF CONTRACTS UNDER SEAL.—RELIEF AGAINST PENALTIES.

The equity to compel specific performance of a contract arises where a contract, binding at law, has been infringed, and the remedy at law by damages is inadequate.[1]

Assuming the legal validity of the contract, **the first requisite is, that there be a valuable consideration,** either in the way of benefit bestowed, or of disadvantage sustained, by the party in whose favor a contract is to be enforced. [78] In equity, where a special remedy is sought in addition to the ordinary one of pecuniary recompense, **a valuable consideration is always requisite, and no additional force is given to the agreement because it is evidenced by an instrument under seal.**

A distinction, however, must be noted between value and adequacy. **It is essential that the consideration be valuable [or at least meritorious, as the payment of debts, making provision for a wife and child, etc.], but is is not essential that it be also adequate.** [79]

Mere inadequacy, if not so gross as to prove fraud or imposition, will not warrant the refusal of relief.[2]

The necessity for valuable consideration is confined in equity, as well as at law, to promises which rest in fieri.[3] If the promise has been already executed, whether at law by transfer of a legal ownership, or in equity by the creation of a final trust, the consideration on which it was made is immaterial. If a donor has perfected his gift in the way which he intended, so that there is nothing left for him to do, and nothing which he has authority to countermand, the donee's right is enforceable as a trust, and, the consideration is immaterial. If, on the contrary, the trans-

1. Eaton's Equity, 525.

2. Eaton's Equity, 539 and cases cited; Adams' Equity, *78, note.

3. That is, executory promises.

action is incomplete, and its final completion is asked in equity, the court will not interpose to perfect the author's liability, without first inquiring into the origin of the claim and the nature of the consideration given. [80]

The second requisite is, that the mutual enforcement of the contract in specie be practicable; *i. e.*, that the contract be one which the defendant can fulfil, and the fulfilment of which on his part, and also on the part of the plaintiff, can be judicially secured.[4]

If the defendant cannot fulfil the contract which he has made, it may be a ground for exempting the plaintiff from costs on the dismissal of his bill, but it cannot authorize the court to decree an impossibility.

The third requisite is, that an enforcement in specie be necessary; *i. e.*, it must be really important to the plaintiff, and not oppressive on the defendant.[5]

It must be really important to the plaintiff; for the equitable remedy is not concurrent with the legal one, but supplemental to it, and will not, therefore, be substituted for such legal remedy, unless a particular necessity be shown. [83] In accordance with this principle, specific performance may be enforced of contracts for the sale of land, of shares in a public company, or of a life annuity, for refraining from specific injurious acts, and generally for any purpose where the specific thing or act contracted for, and not mere pecuniary compensation, is the redress practically required.

It must not be oppressive on the defendant.[6] However important specific performance may be to the plaintiff, yet he has at all events another remedy by damages at law; and it is therefore open to the defendant to contend that a wrong would be inflicted on him by going beyond the ordinary remedy, greater than would be inflicted on the plaintiff by refusing to interpose. [84] Specific performance will accordingly be refused if there has been misrepresentation

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4. Toby v. Bristol County, 3 Story, 800; Stafford v. Bartholomew, 2 Carter, 153.

5. Duncuft v. Albrecht, 12 Sim. 189.

6. Wedgwood v. Adams, 6 Bea. 600; King v. Hamilton, 4 Pet. 311.

by the plaintiff on a material point, although it may not be sufficient to invalidate the contract;[7] if he has induced the defendant to execute a written agreement, on the faith of his verbal promise that it shall be subsequently altered, etc.[8]

Specific performance may be refused where the defendant has by **mistake**, not originating in mere carelessless, entered into a contract framed differently from his own intention, notwithstanding that there is no unfairness on the plaintiff's part, and no defect or doubt in his title;[9] and even the mere fact that **the contract is a hard one**, and would press heavily on the defendant, has in some cases been considered a ground for refusing to interfere.[1] [85]

In applying the equity of specific performance to real estate, there are some modifications of legal rules which at first sight appear inconsistent with them, and repugnant to the maxim, that "equity follows the law."

The first of these modifications or subordinate equities is that of **enforcing parol contracts relating to land, on the ground that they have been already performed in part.** It is enacted by **the statute of frauds** that no action shall be brought on any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. [86] If the requirements of this statute are not complied with, a contract falling within its scope, so long as it remains *in fieri,* cannot be enforced either at law or in equity. It sometimes, however, happens that a contract which is still *in fieri* at law, has been already performed by construction of equity. The doctrine on this point is called **the doctrine of part performance**, and its principle appears to be that, **if one of the contracting parties induce the other so to act that if the contract be abandoned**

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7. Cadman v. Homer, 18 Ves. 10.
8. Clarke v. Grant, 14 Ves. 519.
9. Clowes v. Higginson, 1 Ves. & B. 524.
1. King v. Hamilton, 4 Pet. 311; Wedgwood v. Adams, 6 Bea. 600.

he cannot be restored to his former position, the contract must be considered as perfected in equity, and a refusal to complete it at law is in the nature of a fraud. Such, for instance, is the case, where upon a parol agreement for the purchase of an estate, a party, not otherwise entitled to the possession, is admitted thereto. The equity is still stronger if, after being let into possession, he has been allowed to build and otherwise to expend money on the estate.[2] If the possession may be referred to an independent title, *e. g.*, where it is held under a previously existing tenancy, the same principle does not apply, unless the parties so conduct themselves as to show that they are acting under the contract, nor does it apply to any acts which do not alter the position of the parties. Such, for instance, are the taking of surveys, the preparation of conveyances, the payment of earnest, and even the payment of purchase-money itself; for although all these acts are in some sense a performance of the contract, yet their consequences may be set right by damages at law, and they do not place the parties in a position from which they can only be extricated by its completion. [87]

The same principle which establishes a parol contract where the title under it is sustained by part performance, is also applicable where the purchaser of real estate has waived by his conduct any objection of title. The general rule is, that a contract for the purchase of realty implies as one of its terms that a title shall be shown. In equity, however, the purchaser may accept a defective title, and by treating the contract as already performed, may preclude himself from insisting on any further title. The waiver, however, must be intentional, and his conduct is merely evidence from which the intention may be presumed.

The second subordinate equity is that of allowing time to make out a title beyond the day which the contract specifies. [88] If a substantial ownership exists, though the title be not fully cleared on the appointed day, specific performance may be decreed, and **the court may rectify the inci-**

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2. In nearly all the states part performance takes the case out of the Statute of Frauds. Eaton's Equity, 551-553; Adams' Equity, *86, note.

dental delay by giving the intermediate rents to the purchaser, and interest on the purchase-money to the vendor. The doctrine on this point is expressed by the maxim, that "**time is not of the essence of a contract in equity.**" The mere fact that a day has been specified for completion will not *per se* render it essential. **But the parties may contract on what terms they will, and may declare, if they think fit, that it shall be so considered.**[3] The same conclusion may be drawn by implication from the nature of the property to which the contract refers.[4] If time is not originally declared essential, it cannot be made so by either party alone. But if delay takes place, the aggrieved party may give notice that he abandons the contract, and if the other makes no prompt assertion of his right, he will be considered as acquiescing in such notice, and as abandoning his equity for specific performance.

In the absence of any special matter, **a wide liberty as to time is given to the vendor.** [89] He is permitted to make out his title after the commencement of a suit, or at any time before the making of a final decree,[5] — subject, however, to a liability for costs, where the title has not been shown before litigation began.

The third subordinate equity is that of allowing a conveyance with compensation for defects where a contract has been made for sale of an estate which cannot be literally performed *in toto*, whether by reason of an unexpected failure in the title to part, of inaccuracy in the terms of description, or of diminution in value by liability to a charge. In equity on a bill for specific performance, **if a substantial transfer can be made, it has been considered against conscience to take advantage of small circumstances of variation.** [90] In such a case, therefore, where the mistake made has been *bona fide*, and not material to the purchaser's enjoyment, **the vendor** may insist on performance with compensation. But it must be clear that the defect is not substantial, for a purchaser cannot be required

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3. Eaton's Equity, 549, 550.
4. Id.
5. Eaton's Equity, 545-548.

against his will to pay for anything but what he has bought.[6]

In favor of the purchaser, the equity is of wider application, and the rule is that, although he cannot have a partial interest forced upon him, yet if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, and chooses afterwards to take as much as he can get, he has generally, though not universally, a right to insist on that, with compensation for the defect. [91]

In both cases alike, whether the claim be made by the vendor or the purchaser, **the defect must be one admitting of compensation,** and not a mere matter of arbitrary damages. And the compensation given must be really compensation for a present loss, and not indemnity against a future risk.

A corresponding relief to that by specific performance is given, even in the absence of a contract, **in the case of title deeds or specific chattels of peculiar value detained from the legitimate owner,** by directing them to be delivered up or secured.[7]

The equity of election applies not to cases of contract or of conditional gifts, but to those on which the donor of an interest by will has tacitly annexed a disposition to his bounty, which can only be effected by the donee's assent, *e. g.*, where a testator leaves a portion of his property to A, and by the same will disposes of property belonging to A. [92] In this case there is no contract by A to relinquish his own property, nor is there any condition annexed to the testator's gift, as a term of its acceptance, which requires him to do so. But the double disposition made by the testator implies that he did not intend that A should have both the interests; and he must therefore elect between the two, and either relinquish his own property or compensate the disappointed donee out of the property bequeathed.[8] [93]

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6. Rugge v. Ellis, 1 Dessau. 160; Hepburn v. Auld, 5 Cranch, 262; King v. Bardeau, 6 John. Ch. 38.

7. Eaton's Equity, 527.

8. See 2 Spence's Eq. Jur. of the Court of Chancery, p. 585 *et seq.*; Story's Equity Juris., § 1076 *et seq.*; Eaton's Equity, 180 *et seq.*

Two things are essential to originate this equity, viz.: —

1. **The testator must give property of his own**; for otherwise, if the recipient refuse to give effect to the will, there is nothing on which the right to compensation can attach.[9]

2. **The testator must profess to dispose of property belonging to his donee.**[1] There will therefore be no equity for election, if the gift of such property be not judicially cognizable; as, for example, where, previously to the late Wills Act, a will was made by an infant, or without proper attestation, professing to devise real estate, the heir at law might take a personal legacy under such will, and yet dispute the validity of the devise.

If, on the other hand, the devise is in itself a valid devise, but is ineffectual to pass the particular property, the doctrine of election is not excluded. [94] Such, for example, was the case where a will of earlier date than 1 Vict. c. 26, professed to extent to after-acquired lands. The lands did not pass by the will; but if the heir claimed an interest under it, he was put to his election.

In accordance with the same principle, there is no equity for election if the testator has himself a partial interest which might satisfy the terms of his gift.

In like manner, no case of election will arise if the testator shows by the terms of his gift that he is doubtful whether the property in fact belongs to him, and that he only intends to dispose of it if it is his own. [95]

The election may be either express or emplied; and if not made voluntarily, may be compelled by decree. But the electing party is entitled to know the value of both interests; and the mere fact that the benefit has been conferred, or even that it has been accepted in ignorance of the conveyance, does not bind his right.[2] [96]

The election of the donee, when made, binds himself alone, and does not affect the interests of donees in remainder.

The effect of election is not to divest the property out

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9. Eaton's Equity, 185.
1. Id.
2. Adsit v. Adsit, 2 John. Ch. 448.

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...ion to whom he has manifested an intention to stand in *loco parentis*, in reference to the parental duty of making provision for a child.[4] [98]

Considerations of this imperfect class are not distinguished at law from mere voluntary bounty, but are to a modified extent recognized in equity. And the doctrine with respect to them is, that although a promise made without a valuable consideration cannot be enforced against the promisor, or against any one in whose favor he has altered his intention, yet, **if an intended gift on meritorious consideration be imperfectly executed, and if the intention remains unaltered at the death of the donor, there is an equity to enforce it in favor of his intention, against persons claiming by operation of law without an equally meritorious claim.**

The exercise of the equity in question is now principally confined to supporting defective executions of powers, when the defect is formal, against the remainderman.[5] [99] And the powers to which it applies are those which have been created by way of use, as distinct from bare authorities

3. See, generally, as to the doctrine of election. Eaton's Equity, 180-200, where the subject is fully considered.

4. Perry v. Whitehead, 6 Ves. 544.

5. Bradish v. Gibbs, 3 John. Ch. 533; Dennison v. Goehring, 7 Pa. St. 175.

conferred by law. The equity is confined to cases of execution formally defective, or of contract amounting to such defective execution. [100] If there be no such execution or contract, the court cannot interpose. **If the defect be not formal, but in the substance of the power, the execution cannot be aided in equity,** for such aid would defeat the intention of the donor.

The intention must remain unaltered at the death of the donor. If there be any subsequent act of the donor showing that his original intention is recalled, the equity is at an end.

The party against whom relief is asked must not have an equally meritorious claim. If, therefore, the heir at law or remainderman be a child unprovided for, it seems the better opinion that the equity will not be enforced.[6] [101] It is not, however, sufficient that the heir is disinherited; for if he is provided for, it is immaterial from whom the provision moved. Nor will the court inquire into the relative amount of the provisions made; for on that point the parent is the best judge.

Another class of cases to which the doctrine of meritorious consideration applies, are those **where a man, subject to a moral duty, does an act which may reasonably have been meant in satisfaction of that duty,** and is therefore presumed to have so intended it.

In accordance with this principle, acts which as between strangers would bear one construction may be construed differently where meritorious consideration exists; *e. g.*, a purchase made by one person in the name of another may be construed an advancement or provision in favor of a child, or of one towards whom the purchaser stands *in loco parentis,* instead of a resulting trust for the purchaser.[7] In either case, however, **the doctrine is one of presumption,** not of the construction of the conveyance itself. [102] There is therefore no rule of law which prohibits the use of parol evidence either to counteract or to support the pre-

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6. See Porter v. Turner, 3 Serg. & R. 108.

7. So even though the son be illegitimate. Page v. Page, 8 N. H. 187.

sumption.[8] The only question, however, to which the evidence can apply is, what the father intended at the time of the purchase, and not whether his intention has been afterwards changed.

With respect to legacies, the distinction between legacies to strangers and those to children is that, in the case of a stranger, the legacy is considered mere bounty, and is dealt with by the ordinary rules of law; in the case of a child, it is persumed to be meant as a provision for him, and the ordinary rules are modified by that presumption; *e. g.*, as regards the period from which interest is given.[9]

Another instance occurs in the case of **a prior legacy followed by a gift or legacy of later date,** when the question arises whether the later gift or legacy was intended to be identical with the first, so as to operate either by way of anticipated payment or as a reiteration of the original gift. [103] The construction put by law on the latter gift or legacy is *prima facie* against its being meant as identical, and in favor of its being held an independent benefit. If the donor be a parent, or *in loco parentis,* the presumption is that the first legacy was intended as a provision, proportioned to the then existing claims of the legatee, and that the later gift or legacy had the same object, and was intended as an immediate payment or a modified repetition, either in full or *pro tanto,* by reason of altered circumstances, of the first. [104] And the circumstance that the second benefit differs in amount or disposition from the first, is not inconsistent with such presumption. The doctrine on this point is expressed by the maxim, that "**the presumption is against a double portion.**"[1] This presumption may be rebutted by extrinsic evidence of intention, and sustained by counter evidence of the same kind, notwithstanding that the gift is by a written instrument.

The second case is that of **a promise inter vivos, followed**

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8. Jackson v. Matsdorf, 11 Johns. 91; Tremper v. Barton, 18 Ohio, 418.

9. Bitzer v. Hahn, 14 S. & R. 232. See Adams' Equity (Am. Ed.), *103, note.

1. Lady Thynne v. Glengall, 2 H. Lds. Cas. 153. See Swoope's Appeal, 27 Pa. St. 58.

by a gift or legacy of later date. If the benefit promised and the benefit conferred are precisely identical, no question arises. But if they are not precisely identical, then a question arises whether the gift or legacy was meant in satisfaction, either wholly or in part, of the original promise. [105] If an intention to that effect be shown, the promisee must elect between the two benefits. The *prima facie* construction of the second gift is in favor of its being considered independent of the first.[2]

With respect to creditors, whether mere strangers or children, to whom, by transactions independent of the relationship, the parent has become indebted, the presumption is, that a payment by the debtor, equal to or exceeding the debt, is meant in discharge, and the same doctrine applies to a legacy, provided it be substantially equivalent to payment.[3]

Discharges by Matter in Pais of Contracts under Seal. [106] It is a rule of law, that an agreement under seal, technically termed an agreement by specialty, can only be avoided by a like specialty; and it is therefore unaffected by an accord by parol, or other matter *in pais,* which would operate as a discharge of a simple contract. [This rule has not been adopted in all of the United States.] **In equity, however, the form of agreement is immaterial; and if the act done is in substance a discharge, it will [if founded on a valuable consideration] warranted a decree for the execution of a release, or for delivery up and cancellation of the specialty.**[4]

The equity for relief against enforcement of Penalties originates in the rule which formerly prevailed at law, that on breach of a contract secured by penalty, the full penalty might be enforced without regard to the damage sustained. [107] **The Court of Chancery,** in treating contracts as matters for specific performance, was naturally led to the conclusion that the annexation of a penalty did not alter

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2. See *Ex parte* Pye, 2 Lead. Cas. Eq., p. i, 446, notes; Ainslee v. Bainbridge, 1 R. & M. 657.

3. Plunkett v. Lewis, 3 Hare, 316; Eaton v. Benton, 2 Hill, 576.

4. Cross v. Sprigg, 6 Hare, 552; Campbell's Estate, 7 Pa. St. 100.

their character; and in accordance with this view, **would not on the one hand permit the contracting party to evade performance by paying the penalty, and on the other hand, would restrain proceedings to enforce the penalty on a subsequent performance of the contract itself**; viz., in the case of a debt, on payment of the principal, interest, and costs; or in that of any other contract, on reimbursement of the actual damage sustained.[5] [108] An authority of a similar kind has been now conferred on courts of law by statute.[6]

The jurisdiction of equity is not limited to the case of bonds or of instruments which in terms impose a penalty, but extends to all agreements where a stipulation is made in the event of non-performance, which on the whole matter appears intended as such. If it be not in truth meant as a penalty, but be merely an agreement between the parties that a fixed sum shall be paid, as ascertained or **liquidated damages,** for doing or omitting a particular act, there is no equity to substitute a new agreement. The mere use, however, of the words "liquidated damages" will not of itself decide the question but **it depends on the substantial meaning of the contract.**[7]

The same relief which is granted in the case of penalties has also been extended to **clauses of re-entry for non-performance of the covenants in a lease, for the payment of rent,** on the principle that payment of the rent with interest is a complete compensation for the damage sustained. [109] To this extent the jurisdiction is settled; but it is not carried beyond this limit. Relief will be granted where a forfeiture is incurred by non-payment of money, and perhaps in other cases also, if a special equity be raised on the ground of unavoidable ignorance or accident; but it will not be granted without such special equity, in respect of covenants for repairing, insuring, or doing any specific act, where the compensation must be estimated in damages.[8]

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5. Eaton's Eq. 95 *et seq.*

6. 8 & 9 Wm. 3, c. 11 § 8; 4 & 5 Ann., c. 16, §§ 12, 13. Similar statutes are generally in force in the United States.

7. See, generally, Eaton's Equity, 101 *et seq.*

8. Hill v. Barclay, 18 Ves. 56.

CHAPTER III. [110]

OF MORTGAGES, BOTH PERFECT AND IMPERFECT.

A regular mortgage may be defined as a "security for a debt, created by conveyance of the legal ownership in property, either to the entire extent of the mortgagor's estate, or for a partial estate carved out of it, with a proviso that, on payment at a specified time, the conveyance shall be void, or the mortgagee shall reconvey."[1]

Until the day of redemption is passed, the debtor is not invested with any special equity. He may pay his money according to the proviso, and may thus avoid the conveyance at law; or if the proviso is not for an avoidance of the estate, but for a reconveyance to be made by the mortgagee, he may call on the mortgagee to reconvey accordingly, and on his refusal may file a bill for specific performance.

After the day of redemption is passed, a special equity arises for redemption. The express remedy under the proviso is gone, and **the mortgagee's estate is absolute at law.**[2]

The equity is, that the real transaction was a loan on security, and the forfeiture by non-payment a mere penalty, which may be relieved against on a subsequent satisfaction of the debt. [111] The mortgagor may file a bill, notwithstanding forfeiture, praying for an account and redemption of the estate, and insisting on a reconveyance by the mortgagee on repayment of the principal and interest due, together with all costs in equity or at law properly incurred by the mortgagee in protecting his right.[3]

If the transaction be not in fact a loan, but a bona fide sale, with power to repurchase, there is no equity to inter-

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1. In this country a mortgage is generally considered a mere security for and an incident of the debt. 4 Kent's Com. 160 and notes; Eaton's Equity, 446, 449.

2. See the common law doctrine stated in Eaton's Equity, 445.

3. Eaton's Equity, 446, 449.

fere. A clause of redemption, however, is *prima facie* evidence of a loan. And even if on the face of the conveyance the transaction is termed a purchase, yet its true character may be proved by parol evidence, or by the subsequent conduct of the parties themselves, *e. g.*, if the alleged vendee instead of entering into receipt of the rents, demands and receives interest for his purchase-money.[4]

If the character of a security is once impressed on the conveyance, it is a rule never departed from, that no contemporaneous stipulation can clog the right of redemption, or entitle the creditor to more than repayment of his principal, interest, and costs. [112] This rule is expressed by the maxim, that "**Once a mortgage, always a mortgage;**" and stipulations repugnant to this maxim have been frequently set aside.[5]

The mortgagor's right to redeem is technically called his "**Equity of Redemption,**" and is treated as a continuance of his old estate, subject to the mortgagee's pledge for repayment.[6] [113]

It therefore remains subject to the ordinary incidents of the estate; it passes in the same course of devolution; it may be devised, settled, or conveyed in the same way; or may be transferred to a new claimant by mere length of enjoyment. And the parties making title by these or any other means to the mortgagor's estate have the same right with himself to sue for redemption. If there be several persons all claiming under the mortgagor, they will be entitled to redeem successively according to their priorities.

Another result of the principle which treats the equity of redemption as a continuance of the old estate, is that so long as the mortgagor is left in possession he is considered to hold in respect of his ownership.[7] [114] If there be an

4. A deed absolute on its face may be shown to be a mortgage by parol evidence. Morris v. Nixon, 1 How. 118; Slee v. Manhattan, 1 Paige, 48.

5. This is the universal rule in equity. Adams' Equity (Am. Ed.), *112, note; Eaton's Equity, 448.

6. Eaton's Equity, 448.

7. As between the mortgagor and third persons, he is considered as possessed of the freehold. Williams v. French, 20 Me. 111; Hitchcock v. Harrington, 6 John. 295.

express agreement that the mortgagor shall have possession for a specified period, he is a termor for that period at law; **if there be no express agreement, or if he continue to hold after determination of the specified period, he is at law merely an occupant by permission, and may be ejected at any moment by the mortgagee.** So long, however, as the mortgagee does not exert his power, the mortgagor is considered in equity to hold as owner, and is entitled to the rents in that character. **He cannot, therefore, be made accountable for bygone rents.**[8] **But if the security be insufficient, he may be restrained, at the instance of the mortgagee, from cutting timber on the mortgaged premises.**

If the possession of the mortgagor continue for twenty years, the mortgagee may under the circumstances be altogether barred of his right. The effect of such possession without demand of possession by the mortgagee, or receipt or demand of principal or interest, was to raise a presumption that the debt was satisfied.[9]

The same principle which treats the mortgagor's equity as the actual ownership, necessarily involves the conclusion, that **the mortgagee's legal estate is e converso a mere pledge for repayment.** [115] Nothing short of payment can affect his right.[1]

The parties to whom the mortgagee may transfer his interest, or who may otherwise make title to his estate, are bound by the same equity as himself.

If the mortgagee is dissatisfied with the security for his debt, he may enforce payment by an action at law, or may take possession of the mortgaged estate; or he may, if he choose, pursue both these remedies at the same time, and any other which his contract confers.[2] [117]

If the mortgagee takes possession of the estate, he is treated in equity as holding in respect of his security, and must deal with the estate in conformity with that character.

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8. See Best v. Schermier, 2 Halst. Ch. 154.

9. See local statutes of limitation.

1. Brown v. Lockhart, 10 Sim. 421.

2. The mortgagor is, in most of the states, entitled to the possession of the mortgaged premises and is not accountable for the rents and profits. Eaton's Equity, 466.

He is bound, therefore, to keep the premises in necessary **repair,** but is not bound to spend more than is strictly necessary. [118] He must **account** for all the moneys which he in fact has received, or which without wilful default he might have received, but is not bound to take the trouble of making the most of the property. He is entitled to receive any incidental benefit, provided it be of a pecuniary kind, and therefore applicable in liquidation of his debt; but if it be not of that character, the mortgagor must have it as the real owner.[3]

If a mortgagee is in possession for twenty years, without keeping accounts or otherwise dealing with the property as mortgagee, a presumption arises that the equity is released. [119]

The remedy of the mortgagee by taking possession is practically very inconvenient. In order to remedy this objection, **the mortgagee is allowed after forfeiture to file a bill praying foreclosure of the equity to redeem.** A new day for payment is then fixed by decree, and if default be made, the mortgagor's right is destroyed.[4] The foreclosure, however, may be opened, and the right of redemption revived, if the decree appear to have been unfairly obtained, or if the mortgagee treat the loan as still continuing, as, for example, if he proceed against the mortgagor on bond or other collateral security.

The effect of foreclosure is also produced by the dismissal of a redemption bill on default in payment; for the court will not again interfere, but will leave the parties to their rights at law. [120]

The right of the mortgagee on such a bill is a right merely to foreclose the equity, and does not extend to warrant a sale. In Ireland, and some of the American courts, a different rule prevails, and the mortgagee may in all cases require a sale.[5] [121]

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3. See note to Adams' Equity (Am. Ed.), *118; Eaton's Equity, 466, 467.

4. This is called a strict foreclosure and is still the usual one in Connecticut and Vermont and may be resorted to in some other states. Eaton's Equity, 464.

5. This is the method of foreclosure in nearly all the states. Eaton's Equity, 464.

If an express power of sale is given by the mortgage, such a power forms an additional remedy for the mortgagee, and does not interfere with his right to foreclose.[6]

If the mortgagor become bankrupt, the mortgagee must elect between two courses. He must either relinquish his security and prove for the whole debt, or he must realize his security, and afterwards prove for so much of the debt as the produce is insufficient to discharge.[7]

In addition to regular or perfect mortgages, which convey the legal estate to the mortgagee and specify a day of forfeiture at law, there are other securities of an analogous character, but defective in one or both of these respects. [122]

These imperfect securities are seven in number: viz., 1. **Mortgages of a trust or equity of redemption, and equitable mortgages by imperfect conveyance, or by contract to convey**; 2. **Equitable mortgages by deposit of title deeds** unaccompanied by a written contract; 3. **Welsh mortgages**; 4. **Trust deeds in the nature of mortgage**; 5. **The equitable lien of a vendor, or purchaser of real estate**; 6. **Equitable fi. fa. and elegit**; and 7. **Judgment charges** under 1 & 2 Vict. c. 110, s. 13 and 14.

In a mortgage of a trust or equity of redemption,[8] the legal estate is *ex concessis* outstanding in the trustee or prior encumbrancer, and cannot be transferred to the mortgagee. He is therefore disabled from obtaining possession at law, and is **entitled,** in consequence of that disability, **to have a receiver** appointed in equity, by whom the rents of the estate may be received, and applied in satisfaction of his mortgage. A receiver, however, will not be appointed if a prior legal encumbrancer is in possession, unless the applicant will pay off his demand. If the prior encumbrancer be not in possession, the appointment may be made, without prejudice to his right of applying for the posses-

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6. This method of foreclosure also exists in many of the states. Eaton's Equity, 465.

7. See, generally, Collier on Bankruptcy (1914 Ed.).

8. Second and third mortgages are very common in the states.

sion. **A legal mortgagee cannot have a receiver,** but must take possession under his legal title.

Mortgages by imperfect conveyances, or by an uncompleted contract to convey, entitle the mortgagee to claim specific performance and the execution of a legal mortgage.[9] [123] In the meantime, they stand on the same footing as mortgages of an equity, and entitle the mortgagee to a receiver of the rents.

The second class of imperfect mortgages are **equitable mortgages by deposit of title deeds,** unaccompanied by a written contract.[1]

A mere delivery of deeds, by way of security, unaccompanied by any written contract, will constitute in equity a charge on the land. [124]

The third and fourth classes of imperfect mortgages are **Welsh mortgages,** and **trust deeds in the nature of mortgages.**[2] [125]

A Welsh mortgage is a conveyance of an estate redeemable at any time on payment of principal and interest, and its chief imperfection is the want of a specified day of forfeiture. The consequence of this want is that the mortgagee's remedy is confined to perception of the rents, and that he is not entitled to foreclosure or sale, nor will his liability to account be determined by the lapse of time, unless he has continued in possession for twenty years after the debt was fully paid and satisfied.[3] [126]

Trust deeds in the nature of mortgage are mere conveyances to the creditor on trust for the debtor until default, and after default, on trust to sell and to retain the debt out of the proceeds.[4]

The fifth class of imperfect mortgages is **the equitable lien of a vendor or purchaser of real estate.**

The term lien signifies a right to retain a personal chattel

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9. See, generally, as to equitable mortgages, Eaton's Equity, 475 *et seq.*

1. Not generally applicable to this country, though they seem to have been recognized in a few cases. Eaton's Equity, 477, 478.

2. Not in use in the states. See as to a form of pledge of real estate in Louisiana, Livingston v. Story, 11 Pet. 351.

3. Yates v. Hambley, 2 Atk. 360.

4. Trust deeds, so-called, which are in reality a form of mortgage, are in use in some of the United States.

until a debt due the person retaining is satisfied, and it exists at common law, independently of liens by agreement or usage, in three cases; viz., 1, **Where the person claiming the lien has, by his labor or expense, improved or altered the chattel;** 2, **Where he is bound by law to receive the chattel or to perform the service in respect of which the lien is claimed;** and 3, **Where his claim is for salvage,** as on a rescue of goods from perils of the sea, or from capture by an enemy.

The foundation of this right is the actual possession, and, therefore, if the possession be abandoned, the lien is gone; and if there be any agreement to postpone the time of payment, the same effect follows. [127]

There is also a right at law, in the nature of lien, entitling the vendor of a chattel who has not sold on credit, and has not actually or constructively delivered it to a purchaser, to retain it in his possession until the whole price is paid, notwithstanding that by payment of a portion, the right of property may have passed to the purchaser.[5] The right, however, seems to be merely a right of detention, and not a right to rescind the contract, or to make up the deficiency by a resale; and when the chattel has been delivered, the right is at an end.

The equitable lien on a sale of realty is very different from a lien at law, for it operates after the possession has been changed, and is available by way of charge, instead of detainer. It is an established principle of equity, that **where a conveyance is made permaturely before payment of the price, the money is a charge on the estate in the hands of the vendee; and where the money is paid prematurely before conveyance, it is, in like manner, a charge on the estate in the hands of the vendor.** [128] **The lien thus attaching on the estate is treated as a security in the nature of mortgage; and the remedy under it, is by suing in equity to have the estate resold, and the deficiency, if any, made good by the defendant, or else to have the contract rescinded,** retaining the deposit as forfeited, which is practically equivalent to a foreclosure of the charge.[6]

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5. See Contract of Sale, *ante*.

6. In England and in many of the

The lien is not lost by postponing the day of payment, nor will it be lost by taking a bill, note, or bond as a security for the consideration, although such security be payable at a future day. If, however, the security is inconsistent with a continuance of the charge, the lien is at an end. The question is always one of intention, to be collected from circumstances which have taken place. [129]

The sixth and seventh classes of imperfect mortgages are those of **equitable fieri facias and elegit**, and **judgment charges** under 1 & 2 Vict. c. 110, sects. 13, 14.[7]

The writs of *fieri facias* and *elegit* are writs of execution after judgment, respectively requiring the sheriff to levy the debt out of the debtor's personal or real estate; and being writs issued out of the common law courts, they are confined in their operation to legal interests. The remedy afforded to the creditor in equity when either of these writs has been issued, is termed an equitable *fieri facias* or *elegit*, according as it is sought against personal or real estate. Its *modus operandi* is of a threefold character: first, by injunction against setting up an outstanding estate in bar of execution at law; secondly, by appointment of a receiver; and thirdly, in the case of an equity of redemption by permitting the judgment creditor to redeem. But it is strictly confined to its legitimate object, viz., the imposing on the equitable interest the liability which would attach at law on a corresponding legal interest. [130] In accordance with this principle, as a rule, no relief can be obtained in equity until the title is perfected at law by suing out the writ; but it is not necessary that the writ should be returned.

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states the doctrine of vendor's lien is enforced. See the leading case of Mackreth v. Symmons, 15 Ves. 329; 1 White & Tudor's Lead. Cases in Eq.

355; Eaton's Equity, 484, 486, where the cases are collected.

7. These subjects are regulated by special statutes in the several states, which see.

the same principle, if either party die before completion, the equitable right to the land or purchase-money will devolve as real or personal estate. On the death of the vendee it will pass to the devisee or heir, who will be entitled to have the price paid out of the personalty, or, if the contract be rescinded after the death, will be entitled to the purchase-money instead. [141] On the death of the vendor, it will pass to his executor, for whom the devisee or heir will be a trustee.

The first essential is that the contract be binding, and such as the court will specifically execute.

The second essential is that the object for which conversion is assumed be within the scope of the contract.

There is no equity for assuming a conversion in favor of or against any person who is not a party to the contract.

On an analogous principle to that of conversion, it is held that **where property subject to a trust has been unduly changed, the substituted property is bound by the incidents of that which it represents.** [142]

In like manner, **if an estate or fund has been changed by breach of trust, the cestui que trust may, at his option, waive its restoration, and may attach and follow it in its altered form.**[7] [143] It is essential, however, that the one property shall have been produced by the other; and therefore the doctrine will not apply if the estate be purchased with borrowed money, and a trust fund misapplied in payment of the debt. If a trust fund be applied in paying for the estate, and the *cestui que trust* affirms the purchase, it becomes a purchase with his money, and entitles him to the estate. The same rule has been applied where a contract had been rescinded upon the ground of fraud, and the purchase-money had been traced to a subsequent investment. [144]

The doctrine of conversion, by changing the character of trusts and contracts, and altering them from mere rights of action into actual, though imperfect, titles in equity, gives rise to questions between them and the legal title, and also to questions between conflicting equities, where several

7. See Eaton's Equity, 413 *et seq.*

have been created in reference to the same thing. [145] It therefore becomes necessary to consider **the principle which determines the priority** between such conflicting claims.

The rule of priority in regard to transfers and charges of the legal estate, whether made spontaneously by a conveyance, or compulsorily by a judgment at law, **is that the order of date prevails.**[8] Conveyances take place from the date of the conveyance; judgments against realty from the date of the judgment; and judgments against personalty from the delivery of the writ: nor does the mere **absence of valuable consideration** affect the priority, except where it is provided otherwise by statute. There are, however, several **statutes** which have this effect, viz., the statute of 27 Eliz. c. 4, by which certain grants of real estate are avoided as against subsequent purchasers; that of Eliz. c. 5, by which certain grants either of real or personal estate are avoided against creditors; and the statutes of bankruptcy and insolvency, by which certain grants made by a bankrupt or insolvent are avoided as against his assignees.

By the **statute of 27 Eliz. c. 4,** it is enacted that conveyances, grants, etc., of or out of any lands or hereditaments had or made of purpose to defraud and deceive such persons as shall purchase the same lands or hereditaments, or any rent, profit, or commodity out of the same, shall be deemed and taken only as against such persons and their representatives as shall so purchase the same for money or other good consideration, to be utterly void. And further, that if any person shall make a conveyance of lands or hereditaments, with a clause of revocation at his pleasure, and shall afterwards sell the same lands or hereditaments for money or other good consideration, without first revoking the prior conveyance, then the prior conveyance shall be void as against the vendee.

By the **statute of 13 Eliz. c. 5,** it is enacted that all conveyances, grants, etc., of any lands, hereditaments, goods, or chattels, had or made of purpose to delay or defraud creditors and others of their actions or debts, shall be taken, only as against such persons and their representa-

8. Eaton's Equity, 62-64 113.

tives as shall or might be so delayed or defrauded, to be utterly void; provided that the act shall not extend to any conveyance or assurance made on good consideration and *bona fide* to a person not having notice of such fraud.[9]

The provisions of this statute, like those of the statute in favor of purchasers, **invalidate all conveyances and assignments made with a fraudulent design;** but they do not affect mere voluntary gifts, although the donor may afterwards become indebted. If, however, the party making a voluntary gift is deeply indebted at the time, it affords presumptive evidence that it was meant to defeat his creditors. If the amount given constitutes a large proportion of his estate, it increases the probability of such intent; and if he is in a state of actual insolvency, it appears to be conclusive evidence of fraud. The presumption, however, does not arise except in favor of persons who were creditors when the gift was made. But if the gift is set aside by them, the subsequent creditors will be let in to partake of the fund.

In order to invalidate a gift under this statute, the property must be of a kind to which the creditors can resort for payment; for otherwise they are not prejudiced by the gift. For this reason, if relief be asked in the lifetime of the debtor, **the creditor must obtain judgment for his debt, and the property must be such as can be taken in execution.** [148]

The rule of priority which governs transfers and charges of a legal estate, governs also, in the absence of a special equity, **transfers and charges of an equitable interest. But if legal and equitable titles conflict, or if, in the absence of a legal title, there is a perfect equitable title by conveyance on the one hand, and an imperfect one by contract on the other, priority is given to the legal title, or if there is no legal title, to the perfect equitable one.** This doctrine is embodied in the maxim, that **'between equal equities the law will prevail.'**[1]

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9. A variety of statutes upon the subjects embraced by the statutes above cited will be found in the several states. See, generally, Bump on Fraudulent Conveyances; Twyne's Case, 1 Smith's L. C. (7th Am. Ed.) *33 and notes.

1. Eaton's Equity, 116.

In order, however, that this maxim may operate, **it is essential that the equities be equal.** If they are unequal, the superior equity will prevail; and such superiority may be acquired under any of the three following rules:—

1. **The equity under a trust or a contract in rem is superior to that under a voluntary gift or under a lien by judgment.**[2] [149]

2. **The equity of a party who has been misled is superior to his who has wilfully misled him.**[3] [150] The meaning of the rule is, that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation specifically good. The same principle will apply if he lie by and allow another to expend money in improvements, without giving notice of his own claim. But the fact of improvements having been made in error, where such error was not abetted by himself, creates no equity for reimbursement of their expense.

In order to the introduction of this equity, **it is essential that there be intentional deceit in the defendant, or at all events, that degree of gross negligence which amounts to evidence of an intent to deceive.** [151]

3. **A party taking with notice of an equity, takes subject to that equity.**[4] The meaning of this doctrine is, that if a person acquiring property has, at the time of aquisition, notice of a prior equity binding the owner in respect of that property, he shall be assumed to have contracted for that only which the owner could honestly transfer, viz., his interest, subject to the equity as it existed at the date of the notice. In accordance with this principle, the purchaser of property from a trustee with notice of the trust is himself a trustee for the same purposes; the purchaser of property which the vendor has already contracted to sell, with notice of such prior contract, is bound to convey to the claimant under it, etc. [152]

The notice required by this doctrine is a notice of an

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2. Id., 118.
3. Id., 120.
4. Id., 122.

equity, which if clothed with legal completeness would be indefeasible, and not merely notice of a defeasible legal interest, or of an interest which, if legal, would be defeasible.

A remarkable illustration of the doctrines of notice is presented by **the rule which requires the purchaser under a trust for sale, to see to the application of his purchase-money.** [155] The rule requires the purchaser to ascertain that his purchase-money is in fact rightly applied. [156] If the trust be to pay it over to other persons, he must see that such payments are made; if it be to invest the amount in the names of the trustees, he must see that the investment is duly made, though he need not interfere with its subsequent application.[5] In order to obviate this inconvenience, **it is usual to declare by an express clause that the trustee's receipt shall be a discharge;** and a corresponding authority will arise by implication, if the nature of the trust be inconsistent with the contrary view.

As to what degree of information will amount to notice, it is not essential that the notice be given to the party himself; but notice to his counsel, solicitor, or agent is sufficient, whether given in the same or in another transaction, provided there be adequate reason to conclude that the facts continued in remembrance.[6] [157]

As to notice by lis pendens or an interlocutory decree, it is presumed that legal proceedings, during their continuance, are publicly known throughout the realm. On the other hand, a final decree or judgment is not notice; nor a fiat in bankruptcy; nor the registration of a deed; nor the docketing or the registration of a judgment. [Consult the statutes of the several States upon these subjects.] But if it appear that a search was actually made, it will be pre-

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5. 3 Sug. V. & P. 158. Where the trust is for the payment of scheduled or specified debts, the American cases generally hold that the purchaser must see to the application of the purchase money. Gardner v. Gardner, 3 Mason, 178; Cadbury v. Duval, 10 Pa. St. 267; but where there is a general charge or power to sell for debts or for debts and legacies, the purchaser is not bound to look to the application of the purchase money. Cadbury v. Duval, 10 Pa. St. 267; Gardner v. Gardner, 3 Mason, 178; Andrews v. Sparhawk, 13 Pick. 393; note to Adams' Equity (Am. Ed.), *156.

6. Fuller v. Bennett, 2 Hare, 394.

sumed that the entry was found, and the purchaser will be affected with notice of its contents.

In the absence of any actual information of the equity, the party may also be affected with notice by information of any fact or instrument relating to the subject matter of his contract, which if properly injuired into would have led to its ascertainment.[7] [158] If, for instance, he purchases land which he knows to be in the occupation of another than the vendor, he is bound by all the equities of the party in occupation. If he knows of any instrument forming directly or presumptively a link in the title, he will be presumed to have examined it, and therefore to have notice of all other instruments or facts to which an examination of the first could have led him.

The mere want of caution is not notice. If indeed there be a wilful abstinence from inquiry, or any other act of gross negligence, it may be treated by the court as evidence of fraud; but though evidence of fraud, it is not the same thing as fraud. The party may have acted *bona fide*, and if he has done so, there is no equity against him.[8]

If no superior equity exists, the common course of law is not interfered with. [159] **The equities are equal, and the law, or the analogy of law, will prevail.**

If there be a legal right in either party, the Court of Chancery remains neutral. Thus if the purchaser of property without notice of a prior equity has procured a conveyance of the legal estate either to himself or to an express trustee for him, this legal estate will secure him at law, and his priority therefore will be absolute over all claimants.[9]

If there be no legal right in either party, the Court of Chancery cannot be neutral, for it is the only tribunal competent to take cognizance of the dispute. [160] **In this case, therefore, it acts on the analogy of law,** and gives priority to that title which most nearly approximates to a

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7. Notes to La Neve Le Neve, 2 Lead. Cas. Eq. (1st Am. Ed.), p. i, 155.

8. See Jones v. Smith, 1 Hare, 43.

9. Eaton's Equity, 61; Gibler v. Trimble, 14 Ohio, 323.

legal one; viz., to an executed and perfect title in equity, rather than to one which is executory and imperfect.

The methods by which a title may be perfected in equity differ according to the subject-matter of conveyance. Where an **equity of redemption**, whether in real or personal estate, is the subject, the conveyance will be perfected by the joinder of the mortgagee, and by his declaration that the purchaser shall be entitled to redeem.[1] Where a **trust estate in realty** is the subject, the conveyance will be perfected if the trustee acknowledge a trust for the purchaser, either by executing a declaration to that effect, or by joining in the conveyance of his *cestui que trust*, though without purporting to pass his own estate.[2] Where **a trust estate in personalty or a chose in action** is the subject, the assignment is perfected by notice to the trustee or debtor, which operates as a constructive transfer of possession.[3] [161]

It has been already stated that **in order to avoid the postponement of the latter equity, freedom from notice is indispensable. The notice, however, is a notice existing at the acquirement of the equity, not a notice at the completion of the right.** The latter purchaser or encumbrancer, on payment of his money, becomes an honest claimant in equity, and is entitled, if he can, to protecct his claim.[4]

If there be no legal right, or, in respect of equitable subject-matter, no perfect equitable right in any of the claimants, as, for example, if the estate be still outstanding in the original owner, or in some third person not constituted a trustee for any claimant individually, **the claims will be satisfied in order of date.**[5] [162]

The maxim of non-interference between equal equities is the foundation of the doctrine of tacking in equity. [Inapplicable to this country.]

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1. 3 Sug. V. & P. 422.

2. Maundrell v. Maundrell, 10 Ves. 270.

3. Foster v. Cockerell, 3 Cl. & Fin. 456. Notice is not generally considered necessary in the United States. U. S v. Vaughan, 3 Binn. 394; Warren v. Copelin, 4 Metc. 594. *Contra*, Van Buskirk v. Ins. Co., 14 Conn. 145.

4. See, generally, as to notice, Eaton's Equity, 122 *et seq.*

5. Brace v. Marlborough, 2 P. Wms. 491; Frere v. Moore, 8 Price, 475. See 3 Sug. V. & P. 81, 422.

The cases to which this doctrine applies are those where several encumbrances have been created on an estate, and two or more of them, not immediately successive to each other, have become vested in a single claimant. [163] The doctrine on this subject is, that if the double encumbrancer is clothed with a legal or superior equitable right, he may, as against the mesne claimants, tack to his original claim, a claim for any further amount due to him in the same character, which was advanced expressly or presumptively on credit of the estate without notice of the mesne equity. If, for example, a third mortgagee, having advanced his money without notice of a second mortgage, should afterwards get a conveyance of the legal estate from the first mortgagee, the second mortgagee would not be permitted to redeem the first mortgage, after forfeiture at law, without redeeming the third also.

CHAPTER V. [166]

OF RE-EXECUTION, CORRECTION, RESCISSION, AND CANCELLATION.

The purisdiction of the Court of Chancery for the re-execution of an instrument, and other similar relief, arises not only on a destruction or concealment by the defendant, but also on an accidental destruction or loss, where the missing instrument is such that its non-production would perpetuate a defect of title, or would preclude the plaintiff from recovering at law. The most ordinary instances in which this jurisdiction is exercised, are those of **lost bonds and negotiable securities,** the non-production of which would defeat an action. [167] And in these cases the decree is not confined to re-execution, but, to avoid circuity of action, extends to payment. In order, however, that the jurisdiction may attach, it is **essential that an affidavit be annexed to the bill, averring that the instrument is destroyed or lost,** or that it is not in the plaintiff's custody or power, and that he knows not where it is, unless it is in the hands of the defendant. The same facts must be also admitted or proved at the hearing.[1]

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1. By statute in, we know not how many states, the owner may upon complying with the conditions imposed by statute recover in a court of law. The statute in Illinois is as follows: "If any action founded upon any note, bond, bill, or other instrument in writing, or in which the same, if produced, might be allowed as a set-off in defense, if it shall appear that such instrument was lost while belonging to the party claiming the amount due thereon, to entitle him to recover upon or set off the same, he may, in the discretion of the court, be required to execute a bond to the adverse party in a penalty at least double the amount of such note, bill or instrument, with sufficient security to be approved by the court in which the action is pending, conditioned to indemnify the adverse party, his heirs, executors or administrators, against all claims by any other person on account of such instrument, and against all cost and expenses by reason thereof."

Equity has jurisdiction in such a case notwithstanding the statute. Shields v. Com., 4 Rand. 541; People v. Pace, 57 Ill. App. 674. Plaintiff cannot by suing upon the original consideration under the common counts, escape giving indemnity. Eller v. Uchtman, 10 Ill. App. 488. See, also, generally, O'Neil v. O'Neil, 123 Ill. 361; Irwin v. Planters' Bank, 1 Humph. 145.

The jurisdiction to correct written instruments which have been erroneously framed, is obviously appropriate to equity alone. [168] A court of law may construe and enforce the instrument as it stands, or may set it aside altogether, if there be adequate cause. But it cannot compel any alteration to be made; and avoidance of the entire instrument would, in the case which we are now considering, be a nullification, and not an affirmance, of what was really meant.

The most obvious and easy exercise of this jurisdiction is where an instrument has been executed in order to the performance of a pre-existing trust, or where it purports to have been executed in pursuance of an agreement which it recites. [169] In the former case, the parties bound by the trust have no authority to vary it, or to execute any instrument inconsistent with its terms; and if they do so, whether intentionally or not, there is a manifest equity to correct their error. In the second case, where the instrument purports to carry into execution an agreement which it recites, and exceeds or falls short of that agreement, there is no difficulty in rectifying the mistake; for then there is clear evidence in the instrument itself that it operates beyond its real intent.

If, however, there is no recital of any agreement, but a mistake is alleged, and extrinsic evidence tendered in proof that it was made, the limits of the equity for correction are more difficult to define. **The prima facie presumption of law is, that the written contract shows the ultimate intention,** and that all previous proposals and arrangements, so far as they may be consistent with that contract, have been deliberately abandoned. It seems, however, that **the instrument may be corrected, if it is admitted or proved to have been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent; or if it is admitted or proved that an instrument intended by both parties to be prepared in one form, has, by reason of some undesigned insertion or omission, been prepared and executed in another.** But it is not sufficient that there is a mistake as to the legal con-

sequences of the instrument; for to admit correction on this ground would be indirectly to contrue by extrinsic evidence, and **the proper question is not what the document was intended to mean, or how it was intended to operate, but what it was intended to be.**[2] [170]

In order to sustain a bill for relief under this equity, **it is essential that the error be on both sides, and that it be admitted by the defendant or distinctly proved.** [171] It must be a mistake on both sides, for if it be by one party only, the altered instrument is still not the real agreement of both. A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance; but it cannot be a ground for altering its terms.[3]

Where land is the subject of the erroneous instrument, **the reformation of an executed conveyance on parol evidence is not precluded by the statute of frauds,** for otherwise it would be impossible to give relief.[4] And where a mistake in an executory agreement relating to land is alleged, parol evidence may be admitted in opposition to the equity for specific performance.

A will cannot be corrected by evidence of mistake, so as to supply a clause or word inadvertently omitted by the drawer or copier. [172] But it seems that if a clause be inadvertently introduced, there may be an issue to try whether it is part of the testator's will.[5]

In addition to the cases of correction on direct evidence of mistake, there are others where it has been decreed on a presumption of equity; as, for example, where bonds given for payment of a joint and several debt, but drawn up as merely joint, have been reformed in equity and made joint and several, so as to charge the estate of a deceased obligor. On the same principle it is held that where a loan has been made to several persons jointly, it must be presumed that every debtor was to be permanently liable, until the money should be paid; and that therefore a debt so arising,

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2. See, generally, Eaton's Equity, 619 *et seq.* and cases cited.
3. Id., 620.
4. Id., 622.
5. 8 Vin. Abr. 188, G. a, pl. 1; Newburgh v. Newburgh, 5 Madd. 364.

though at law it is the joint debt of all the co-debtors, shall be treated in equity as the several debt of each.[6] An important instance of the equity in respect to co-debtors occurs in the case of **debts owing by a partnership.** On the death of a partner, the liability survives at law, and the debt is chargeable on the surviving partners alone. But the deceased partner's assets remain liable in equity; and the liabilities may be enforced either by the creditor or by the surviving partners.[7]

The jurisdiction for Rescission and Concellation arises where a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance, or mistake of facts material to its operation. [174] And it is **exercised for at double purpose**; first, for **cancelling executory contracts,** where such contracts are invalid, but their invalidity is not apparent on the instrument itself, so that the defence may be nullified by delaying to sue until the evidence is lost; and secondly, for **setting aside executed conveyances or other impeachable transactions,** where it is necessary to replace the parties *in statu quo.*

The mode of relief under this equity may be by **cancelation** of the instrument, or **reconveyance** of the property which has been unduly obtained, or by an **injunction** against suing at law on a vitiated contract, or against taking other steps to complete an incipient wrong.

1. **Rescission and Cancellation for illegality.**

It is a **maxim** of law that "**ex turpi causa non oritur actio;**" and, therefore, if a contract of such a character be made, its invalidity will be a defence at law, whilst it remains unexecuted; and *pari ratione,* **if its illegal character be not apparent on the face of it, will be a ground for cancellation in equity.** [175] Such, for instance, are contracts entered into for the purposes of gaming or smuggling, for inducing or aiding prostitution, etc.[8]

If the contract be already executed, it cannot be set aside as illegal or immoral; for it is a **maxim** that "**in pari delicto**

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6. Thorpe v. Jackson, 2 Y. & C. 553. See *quaere* in 2 DeG. M. & G. 886.

7. See *post,* Partnership.

8. See, generally, Eaton's Equity, 69, 625.

melior est conditio defendentis."[9] But it is otherwise where a law is made to prevent oppression, and the oppressd party is asking relief, *e. g.*, on a breach of the statutes against usury; for in such a case, although the complainant has joined in violating the law, he is not considered in pari delicto, but may defeat the contract after completion.[1]

So long as the contract continues executory, the maxim of "in pari delicto" does not apply; for the nature of the contract would be a defence at law, the decree of cancellation is only an equitable mode of rendering that defence effectual. The prayer, however, must be confined to cancellation of the contract, and must not couple relief in affirmance of it, such as specific performance or reformation of error.

2. **Rescission and Cancellation by reason of fraud.**

The avoidance of transactions on the ground of fraud is a copious source of jurisdiction in equity. With respect to fraud used in obtaining a will, this jurisdiction does not exist. If the will be of real estate, it is exclusively cognizable at law; if of personal estate, in the Ecclesiastical Court.[2] In other cases of fraud, the Court of Chancery has concurrent jurisdiction with the courts of law; and this jurisdiction will be exercised against any one who has abetted or profited by the fraud, and after any length of time. [176] The infancy of the defrauding party will not exonerate him. The absence of personal benefit is no excuse. Even the innocence of a party who has profited by the fraud, will not entitle him to retain the fruit of another man's misconduct, or exempt him from the duty of restitution.

With respect to what will constitute fraud, it is impossible to lay down a specific rule; but the most ordinary instances of its occurrence are the procuring contracts to be made or acts to be done by means of wilful misrepresenta-

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9. Gill v. Webb, 4 Monr. 299; Swartzer v. Gillett, 1 Chand. (Wisc.) 207.

1. See note Adams' Equity (Am. Ed.), *175.

2. See, however, note Adams Equity (Am. Ed.), *248.

tion, either express or implied, and the procuring them to be made or done by persons under **duress or incapacity.**

In order to constitute a fraud of the first class, there must be a representation, express or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his contract or act. [177]

Where no statement has been expressly made, **a misrepresentation may nevertheless be implied from conduct.** [178] **But mere non-disclousre is generally not equivalent to fraud.** There are, however, cases of a different character, where the contract is necessarily based on the assumption of a full disclosure, and where, for that reason, any degree of reticence on a material point is fraud, as in the case of contracts of **insurance** and **suretyship.**

Another case of the same character occurs in **compositions by a debtor with his creditor,** where a secret bargain has been made with particular creditors. [179] All such secret arrangements are utterly void. [180]

In like manner **a secret agreement on marriage, in fraud of the relations** or friends of one of the parties, will be relieved against in equity.

Another class of transactions which have been held void, as amounting to a fraud on the marriage contract, are **conveyances by an unmarried woman of her property, pending a treaty of marriage,** without the knowledge of her intended husband.[3]

Besides that kind of **fraud,** which consists in misrepresentation, express or implied, there is another which **vitiates contracts made by persons under duress or incapacity.**

If an act be done **under actual duress,** it may be afterwards avoided even at law.[4] [182]

The conveyances and contracts of idiots and lunatics (except during a lucid interval) are also, generally speaking,

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3. See Eaton's Equity, 343; Logan v. Simmons, 3 Ired. Eq. 487; Tucker v. Andrews, 13 Me. 124.

4. Such an act is voidable, not void. See Ewell's Lead. Cases (1st Ed.), 760-794.

void at law.[5] But the feoffment of an insane person is held not to be absolutely void, but voidable only.[6]

The mere fact that the party was in a state of lunacy, or even that he was under confinement, will not per se induce the court to interfere, if it be distinctly shown that the act was beneficial to him, that no coercion or imposition was used, and that he knew clearly what he was doing.[7] [183]

It has been held also that, independently of that utter imbecility which will render a man legally *non compos* **a conveyance may be impeached for mere weakness of intellect, provided it be coupled with other circumstances to show that the weakness, such as it was, has been taken advantage of by the other party.** But the mere fact that a person is of weak understanding, if there be no fraud or surprise, is not an adequate cause for relief.

A person drunk to the extent of complete intoxication, so as to be no longer under the guidance of reason, appears to be absolutely incapable of making a contract, so that his deed is void at law.[8] **If the degree of intoxication falls short of this, a court of equity will generally not assist the other party in enforcing his claim.** But it seems that it will confine itself to standing neuter, and will not relieve against the instrument, unless the contracting party was drawn in to drink by the contrivance of the other.[9]

The same principle which vitiates a contract with an incapacitated person is extended in equity to avoid benefits obtained by trustees from their cestuis que trustent, or by other persons sustaining a fiduciary character from those in regard to whom that character exists.

If a **trustee** be appointed for the sale or purchase of property, he cannot sell to or purchase from himself, however honest, in the particular case, the transaction may be. [184] It is not necessary to show that an improper advantage has been made; but the *cestui que trust*, if he has not confirmed

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5. See, however, Ewell's Lead. Cases (1st Ed.), 559, 574, 587.

6. See Ewell's Lead. Cases (1st Ed.), 559-574 and notes.

7. See Ewell's Lead. Cases (1st Ed.), 628 *et seq.* and notes.

8. It is voidable, not void. Ewell's Lead. Cases (1st Ed.), 738.

9. Id., 740 and notes.

the transaction with full knowledge of the facts, may, at his option, set it aside.[1]

There is, however, no positive rule that a trustee cannot deal with his cestui que trust; but in order to do so he must fully divest himself of all advantage which his character as trustee might confer, and must prove, if the transaction be afterwards impugned, that it was in all respects fair and honest.[2] And where even any person stands in a **relation of special confidence** towards another, so as to acquire an habitual influence over him, he cannot accept from him a personal benefit without exposing himself to the risk, in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained. The general principle applies to all the variety of relations in which dominion may be exercised by one person over another; but in proportion as the relationship is less known and definite, the presumption of fraud is less strong. [185] Where the known and definite relationship exists of **trustees and cestui que trust, attorney and client,** or **guardian and ward,** the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage beyond the kindly feeling which the connection may have caused. Where the only relation is that of friendly habits and habitual reliance on advice and assistance, accompanied by partial employment in business, care must be taken that no undue advantage shall be made. But no rigorous definition can be laid down, so as to distinguish precisely between the effects of natural and often unavoidable kindness, and those of undue influence or undue advantage.[3]

The acts which have been hitherto the subject of inquiry are either directly fraudulent at law, or are held fraudulent in equity by analogy to law. [186] There is **another class of equitable fraud** in which the legal analogy is less perceptible. The fraudulent transactions here referred to are **bargains made with expectant heirs or re-**

1. Eaton's Equity, 323 and cases cited.
2. Id., 324.
3. Eaton's Equity, 324, 326, 328.

maindermen, during the lifetime and without the knowledge of the parent or other ancestor. Bargains of this kind are not necessarily and absolutely void. **They may be sustained ab initio, if they are proved free of unfairness or inadequacy; or they may be made good afterwards by the bargainer,** either by express confirmation or by continued acquiescence, after the original pressure of his necessities has ceased. But unless they can be sustained on one of these grounds, they may be set aside at the suit of the bargainer, partly as having been made under the pressure of necessity, but principally as being a fraud on the parent or ancestor.[4] **The decree** in such a case will be that the conveyance shall be set aside as an absolute sale, but shall stand as a security for the principal and interest of the money advanced. [187]

3. A transaction may be rescinded, though not vitiated by illegality or fraud, on the ground that it has been carried on in **ignorance or mistake of facts** material to its operation. [188]

By the common law, **money paid voluntarily under a mistake of fact** may be recovered back as money had and received. **On the same principle, acts which have been done voluntarily under a like mistake may be recalled or annulled by a suit in equity.**

The most ordinary applications for this class of relief occur where **releases or compromises** have been made affecting rights, of which the existence was unknown or the character mistaken by the party executing the release or compromise; and there are three forms in which such ignorance or mistake may exist, viz.:—

1. **Where the instrument is executed, not by the way of releasing or compromising a particular right, but in ignorance or mistake as to the facts which originate that right, such instrument would be set aside in equity.**[5] [189]

2. **Where the uncertainty either of the facts or of the law is present to the parties' minds, and they intend to compromise their rights, whatever they may be,** *i. e.*, knowing the facts, to compromise the law, or, being doubtful of

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4. Eaton's Equity, 321, 329.

5. Id., 255-266 *et seq.*

the facts, to compromise both fact and law, **there is no reason to set aside the transaction.**[6]

3. **The third class of cases, where the facts are known but the law is mistaken,** have been to some extent the subject of conflicting authorities. **The rule at law** is clear, that **"money paid by a man with full knowledge of all the circumstances, or with the means of such knowledge in his hands, cannot be recovered back again on account of such payment having been made in ignorance of the law."**[7] The principle ought to be the same in equity. The authorities which appear most opposed to it are those of Bingham v. Bingham, 1 Ves. Sr. 126, and Lansdown *v.* Lansdown, Mosley, 364; 2 Jac. & W. 205. In general, however, the rule may be stated to be that **in equity, as well as at law, a mere mistake of law, where there is no fraud or trust, and no mistake of fact, is immaterial.**[8] [191]

The remedy which the court affords on a void transaction **is the replacement of the parties in statu quo.** If, for example, a bill be filed by the obligor of a usurious bond to be relieved against it, the court, in a proper case, will cancel the bond, but only on his refunding the money advanced. The equity is to have the entire transaction rescinded, and if the obligor will have equity, he must also do equity.[9]

There is, also, a **jurisdiction to set aside awards** on the ground of miscarriage in the arbitrators, where the fact of such miscarriage does not appear on the award, and cannot, therefore, be made a ground for impeaching it at law.

A dispute may be referred to arbitration in three ways.[1] 1. The reference may be **by mere agreement** of the parties, unaided by the direction of any court; 2. It may be **by a rule of court,** made by consent in an action actually depending; and 3. It may be **by agreement to refer existing disputes,** which might be the subject of a personal action or suit in equity, but **with respect to which no proceedings**

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6. Eaton's Equity, 264.
7. Id., 265.
8. Id., *258, 266.
9. Id., 65.

1. In most of the states the subject of arbitration is regulated by statute. Therefore, consult the local statutes.

are actually depending. [192] In those cases where the submission is by mere agreement, it is revocable by either party until the award is made at the peril of an action for breach of contract; but where the agreement has been made a rule of court, under the provisions of 9 & 10 Wm. III. c. 15, it is now by statute declared irrevocable, unless by leave of the court or one of its judges.

After the award has been made, the power of revocation is at an end;[2] and the award may be enforced by either party, either by action on the award or on the contract to refer, or in a proper case by suit in equity for specific performance,[3] or, if it has been made a rule of court, by an attachment for contempt.

In order to resist the enforcement of the award, it is necessary that its validity be impeached. It is not sufficient for this purpose to contend, or even to prove, that it is unreasonable or unjust. But if any **fraud or partiality** be shown, it **will palpably vitiate the award.**[4] And even in the absence of actual misconduct, the same result may follow, if the arbitrators have failed in performance of their duty; *e. g.*, if they have not declared their decision with certainty; if their award be not final on all points referred; if it exceed the authority given; if they have acted on a mistake of law, when the law itself is not referred, but the reference was to decide on facts according to law; or if they have acted on a mistake as to a material fact, admitted by themselves to have been made and to have influenced their judgment.

If any of these objections appear on the face of the award, they invalidate it, and preclude its enforcement at law; **and if there be actual fraud, it may be pleaded in avoidance at law.** [193] If there be **mere miscarriage, not apparent on the face of the award,** it cannot be pleaded in avoidance at law, but must be made available by an independent application to set aside the award. **And where**

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2. See Tobey v. Bristol County, 3 Story, 800.

3. Jones v. Boston Mill, 4 Pick. 507.

4. Herrick v. Blair, 1 John. Ch. 101.

the submission rests on mere agreement, and is not a rule of any court, the jurisdiction for this purpose is exclusive in equity. If the submission is by rule at nisi prius, the jurisdiction is concurrent in law and equity. For the court of law which directed the reference retains a superintending power, and the Court of Chancery has its ancient jurisdiction over the parties to the action, of which the reference is merely a modified continuance. In the third class, **where a submission by agreement, not made in any cause, has been made a rule of court** under the statute, the jurisdiction is exclusive in the court of which the submission has been made a rule.

CHAPTER VI. [194]

OF INJUNCTION AGAINST PROCEEDINGS AT LAW.— BILLS OF PEACE. — INTERPLEADER.— INJUNCTION AGAINST TORT.

The equity for rescission is effectuated, not only by cancellation of an instrument or by reconveyance of property, but by **injunction** against suing at law on a vitiated contract, or against taking other steps to complete an incipient wrong. **The right to injunctive relief** is not confined to the equity for rescission, but **extends to all cases where civil proceedings have been commenced before the ordinary tribunals in respect of a dispute which involves an equitable element, or where an act is commenced or threatened, by which an equity would be infringed.** The restraint may be imposed either by a **final decree,** forbidding the act *in perpetuum* [1] on establishment of the adverse right, or by **interlocutory writ,** forbidding it *pro tempore* [2] whilst the right is in litigation.

The injunction against proceedings in another court is an auxiliary decree or writ, made or issued to restrain parties from litigation before the ordinary tribunals where equitable elements are involved in the dispute. The existence of such an equitable element, or the pendency of a suit respecting it, is not recognized by the ordinary tribunals as a bar to their own procedure; but the bar must be made effectual by an **injunction** [3] out of Chancery, which does not operate as a prohibition to the ordinary court, but **restrains the plaintiff personally from further steps.**[4] [195]

As soon as the defendant has put in a full answer, he may move to dissolve the injunction. [196] And it is then a question for the discretion of the court, whether on the facts disclosed by the answer, or, as it is technically termed,

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1. Forever.

2. For the time being.

3. See the subject of staying actions and suits by injunction fully considered in Joyce on Injunctions (1909), ch. 19, where the cases are fully collected.

4. The parties, not the court, are restrained. Joyce on Injunctions, § 545.

on the equity confessed, the injunction shall be at once dissolved, or whether it shall be continued to the hearing. **The general principle of decision is, that if the answer shows the existence of an equitable question, such question shall be preserved intact until the hearing.** But the particular mode of doing this is matter of discretion.[5]

If the plaintiff is willing to admit the demand at law, and to give judgment in the action, but is unwilling to pay money to the defendant, which, if once paid, it might be difficult to recover, he may have the injunction continued on **payment of the money into court.** If he is desirous to try his liability at law, the injunction will be dissolved with **liberty to apply again after a verdict;** but **unless the defendant's right at law be admitted, he will not be restrained from trying it,** except where it is obvious from his own answer that the relief sought must ultimately be decreed. **Where the question has been already tried at law, and judgment obtained by the plaintiff there, he will be restrained from issuing execution, if it appear that there is an equitable question** to be decided before the matter can be safely disposed of. **If at the hearing the decision is with the plaintiff in equity, the injunction is made perpetual.**

The exercise of the jurisdiction after judgment is not frequent. The rule on this subject appears to be as follows: First, that **if, after judgment, additional circumstances are discovered not cognizable at law, but converting the controversy into matter of equitable jurisdiction, the Court of Chancery will interpose.** [197] Secondly, that **even though the circumstances so discovered would have been cognizable at law, if known in time, yet if their non-discovery has been caused by fraudulent concealment, the fraud will warrant an injunction.** But, thirdly, that if the

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5. It is the almost universal (but not inflexible) practice to dissolve the injunction, where the answer fully denies the equity of the bill; and also to deny the writ when applied for after such an answer has been filed. Hoffman v. Livingstone, 1 John. Ch. 211; Livingston v. Livingston, 4 Paige Ch. 111; Hollister v. Barkley, 9 N. H. 230; Roberts v. Anderson, 2 John. Ch. 204.

newly discovered facts would have been cognizable at law, and there has been no fraudulent conceament, the mere fact of their late discovery will not of itself create an equity;[6] although if a bill of discovery has been filed in due time, the proceedings at law might have been stayed until the discovery was obtained. And still less can any equity arise, if the facts were known at the time of the trial, and the grievance complained of has been caused either by a mistake in pleading, or other mismanagement, or by a supposed error in the judgment of the court.

The jurisdiction to enjoin against proceedings in other courts is not limited to proceedings in the courts of law, although it is more usually exerted with reference to them. [198]

In addition to the injunctive jurisdiction in regular suits, **there is a similar authority exercised in a summary way, where proceedings have been taken in another court, against or by officers of the Court of Chancery, in respect of claims arising out of their official acts.** [199] In this, as well as the former cases, the principle on which the court proceeds is that of giving efficacy to its own authority by rejecting foreign interference. If its processes are improprly or irregularly issued, that is a matter to be dealt with by itself alone; and if redress be sought elsewhere an injunction will lie. If in acting under a regular authority its officers misconduct themselves, that is a matter which may, at the discretion of the court, be either left to the ordinary tribunals, or examined by itself. But the latter course is generally adopted, and the parties are enjoined from having recourse to law.

A bill of peace is a bill filed for securing an established legal title against the vexatious recurrence of litigation,

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6. "Any fact which clearly proves it to be against conscience to execute a judgment at law and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agent, will authorize a court of equity to interfere by injunction." Note, Adams' Equity (Am. Ed.), *197; Maine Ins. Co. v. Hodson, 7 Cranch, 332 and other cases there cited; Joyce on Injunctions, ch. 21.

whether by a numerous class insisting on the same right, or by an individual reiterating an unsuccessful claim. The equity is, that if the right be established at law, it is entitled to adequate protection.

Bills of peace of the first class are those where the same right is claimed by or against a numerous body; as, for example, where a parson claims tithes against his parishioners, or the parishioners allege a *modus* against the parson. In all these cases, the only form of procedure at common law would be that of a separate action by or against each parishioner, which would only be binding as between the immediate parties, and would leave the general right still open to litigation. [200] In order to remedy this evil, a suit may be sustained in the Court of Chancery, in which **all parties may be joined, either individually or as represented by an adequate number. If any question of right be really in dispute, it will be referred to the decision of a court of law; and when the general right has been fairly ascertained, an injunction will be granted against further litigation.** If particular individuals have special grounds of claim, those claims will be left untouched.[7]

In order to originate this jurisdiction, it is essential that there be a single claim of right in all arising out of some privity or relationship with the plaintiff.

A bill of peace, therefore, **will not lie against independent trespassers**, having no common claim and no appearance of a common claim to distinguish them from the rest of the community.

Bills of peace of the second class are those where a right, claimed by an individual, is indefinitely litigated by him without success. [201] The necessity for bills of this class originates in the nature of the action of ejectment, which is based on a fictitious dispute between fictitious parties, so that the rights of the real litigants are only indirectly tried. [202] The consequence of this is that the result of the action is not conclusive, but that fresh actions may be repeat-

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7. In order to maintain a bill of peace the complainant must have first established his title at law. Eldredge v. Hills, 2 John. Ch. 281. See, generally, Joyce on Injunctions, §§ 518-544.

edly brought, and the successful party harassed by indefinite litigation. In order to remedy this oppression, a jurisdiction has been assumed by the Court of Chancery; and a bill will lie, after repeated trials at law and satisfactory verdicts, to have an injunction against further litigation.[8]

A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt, or duty; but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is that the conflicting claimants should litigate the matter amongst themselves, without involving the stakeholder in their dispute.

In order to originate the equity of interpleader, three things are essential, viz.: —

1. **The same thing, debt, or duty must be claimed by both the parties against whom relief is asked.** [203]

If the subject in dispute has a bodily existence, as in the original cases of interpleader at law, no difficulty can arise on the ground of identity; but where it is a chose in action, it becomes necessary to determine **what constitutes identity.** [204] And this is a question which, in each case, must be determined by the original nature and constitution of the debt.

2. **The party seeking relief must have incurred no independent liability to either claimant.**

3. **He must claim no interest in the matter.** [205]

If the circumstances be such as to sustain the jurisdiction, the party against whom the double claim is made may, for his own protection, file a bill praying that the claimants may **interplead** together, and that he may be **indemnified;** and on payment into court of the amount due may obain an **injunction** against any proceeding commenced or threatened at law or in equity.[9]

When an answer has been put in by the enjoined defend-

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8. Joyce on Injunctions, § 521. In some states there are statutes limiting the number of trials in ejectment. Consult the local statutes.

9. See Joyce on Injunctions, §§ 541, 564; Eaton's Equity, 639 *et seq.*

ant, he may move to dissolve the injunction, on notice to the plaintiff and his co-defendant; and if such co-defendant has also answered, **an order may be made for inquiry as to the respective titles.** [206] But such inquiry cannot be directed whilst either answer is outstanding, because the court cannot know what claim such answer will make. **If the cause is carried to a hearing, a like inquiry or an action will be directed** by the decree; but the more usual practice is to obtain the direction at an earlier stage. **The decree, when made, may terminate the suit as to the plaintiff,** though the litigation may continue between the co-defendants; and in that case it may proceed without revivor, notwithstanding the plaintiff's death.

The only equity on which the jurisdiction of interpleader rests, **is the danger of injury to the plaintiff** from the doubtful titles of the defendants. He is required, therefore, to satisfy the court that this equity exists by annexing to his bill an **affidavit** that he does not collude with either claimant, and the want of that affidavit is a ground of demurrer.

The injunction against an act commenced or threatened, by which an equity would be infringed, like that against suing in the courts of law, **is often used as an auxiliary process in respect of ordinary equities;** *e. g.*, where a trustee is enjoined from committing a breach of trust, etc. [207] But there is one class of cases in which the necessity for injunctive relief constitutes *per se* an independent equity; viz., that of **torts** as a class of civil wrongs distinct from cases of trust, of contract, and of fraud.

The principle of injunctive relief against a tort is, that whenever damage is caused or threatened to property, admitted or legally adjudged to be the plaintiff's, by an act of the defendant, admitted or legally adjudged to be a civil wrong, and such damage is not adequately remediable at law, the inadequacy of the remedy at law is a sufficient equity, and will warrant an injunction against the commission or continuance of the wrong. And though damages cannot be given in equity for the plaintiff's loss, yet if the defendant has made a profit, he will be decreed to account.

The equity is not confined in principle to any particular

acts, but those in respect of which it is most commonly enforced are five in number, viz.: waste, destructive trespass, nuisance, infringement of patent right, and infringement of copyright. [208]

Waste.— The essential character of waste is, that the party committing it is in rightful possession. And, therefore, the remedy at law is by trespass on the case for the injury done to the reversion. **There are, however, no means at law of stopping the waste itself whilst the tenancy continues; and for that purpose, if the reversioner's title be admitted or proved at law, the prohibitive jurisdiction of equity has been always exercised.**[1]

There is also a kind of waste cognizable in equity alone, and called **equitable waste, where the owner of a particular estate, made unimpeachable of waste at law, is committing waste mala fide,** or in a manner not contemplated by the donor, *e. g.*, by maliciously attempting to destroy the property or attempting to cut down timber which was planted for ornament, or which is evidently unfit to be cut, and which was, therefore, not meant to be included in his authority. [209]

Destructive trespass is damage, amounting to the destruction of the estate, done by a stranger, whose possession or entry is unlawful. It is now settled that **an injunction will lie for protection of a title, admitted or proved at law, whenever the act complained of is not a mere ouster or temporary trespass, but is attended with permanent results, destroying or materially altering the estate;** as, for example, if a man be pulling down his neighbor's house, felling his timber, working his quarries, or the like.[2] [210] If it be a mere ouster of temporary trespass, the recovery of the land by an action of ejectment, or of pecuniary damages by an action of trespass, are sufficient remedies, and an injunction will not lie.

The remedy at law for nuisance is by **indictment** in respect of public nuisances, and by **action** in respect of private nuisances or of the private injuries resulting from public

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1. See a full treatment of this topic in Joyce on Injunctions, ch. 40.

2. Id., ch. 39.

ones. And the party aggrieved may also **abate** or remove the nuisance by his own act, so as he commit no riot in doing it, nor occasion, in the case of a private nuisance, any unnecessary damage. [211] The remedies, however, at law can at the utmost only abate or afford compensation for an existing nuisance, but are ineffectual to restrain or prevent such as are threatened or in progress; and for this reason **there is a jurisdiction in equity to enjoin, if the fact of nuisance be admitted or established at law, whenever the nature of the injury is such that it cannot be adequately compensated by damages, or will occasion a constantly recurring grievance.**[3]

The patent right of an inventor is personal property, and assignable by writing under hand and seal; and if it be infringed, the inventor or his alienee has **a remedy at law,** by an action for damages. [212] **And in consideration of the inefficiency of that remedy, he may also, if the validity of his patent and the fact of infringement are admitted or established at law, have a remedy in equity by injunction and account.** The right originates in the character of the patent as private property, and not in the mere exclusive privilege. The validity of the patent itself, and the fact of infringement, are matters which, if doubtful, must be determined at law.[4] [213]

The copyright of an author, like the patent right of an inventor, is personal property, and transferable by assignment. [215] If the right be infringed, **the remedy** of the author or his alienee **at law** is by an action of trespass on the case for damages; and by an action of detinue or trover for the pirated copies or their value. [216] **He may also sue in equity for an injunction and account** if the right and infringement are admitted or established at law.[5] The jurisdiction to enjoin in equity is expressly for the protection of copyright as property, and not for the prevention of improper publications. There is, therefore, no jurisdiction to enjoin against a wicked or libelous work, merely on the ground of its mischievous character; and, on the other

3. See Joyce on Injunctions, ch. 38.
4. See Joyce on Injunctions, ch. 27.
5. See Joyce on Injunctions, ch. 29.

hand, if a work alleged to be copyright be tainted by immorality, libel, or fraud, it is not acknowledged as property at law; and in that case, or even if it be of a doubtful tendency, the Court of Chancery will not interfere. The existence of the right itself, and the fact of the infringement, are matters, which, if doubtful, must be determined at law.

There is also a jurisdiction to enjoin against the use of a secret of trade which has been fraudulently obtained, and to enjoin against damaging the plaintiff's business by representing a spurious article to be his. If a person, having made a discovery, does not choose to protect it by a patent, he has no exclusive right to the invention; and if another person can discover the secret, there is no equity to restrain him from using it. It must, however, be discovered by legitimate means; and, therefore, if the party acquiring it has resorted to a breach of trust or a fraud, he will be restrained from availing himself of what he has learned.[6]

Trade-marks.— If, again, a person has adopted a particular device, with a view to denoting a particular article or manufacture as his own, he does not necessarily acquire a copyright in such device, and cannot restrain on that ground its user by another man. [217] But he is **entitled, on the ordinary principles of law, to insist that no other person shall injure his business by representing a suprious article to be his,** although the genuine article may be the one to which he has no exclusive right. And, therefore, if such a representation be made, either by direct misstatement or by imitation of his device, he may recover damages at law for the injury to his business, and *pari ratione* may have an **injunction** in equity.[7]

Having now examined the chief objects of the injunctive equity, we must, in conclusion, notice **the chief incidents of the equity itself.** These incidents are three in number:—

First, **it attaches only on an admitted or legally adjudged right in the plaintiff, admitted or legally adjudged to be in-**

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6. Williams v. Williams, 3 Meriv. 157.

7. Joyce on Injunctions, ch. 26, where the above subject is treated exhaustively.

fringed by the defendant. The existence of the right, and the fact of its infringement, must be tried, if disputed, in a court of law. And, therefore, if the plaintiff resorts to equity in the first instance, he should forthwith move for an interlocutory injunction to protect his alleged right until decree, and thus give an opportunity of directing a trial at law, so that when the cause comes on for hearing it may be ready for immediate adjudication. When the motion for an interlocutory injunction is made, the court, having regard to the extent of *prima facie* title shown, the probability of mischief to the property, and the balance of inconvenience on either side, will either grant the injunction, accompanied by a provision for putting the legal right into an immediate course of trial; or will send the parties to law, directing the defendant to keep an account; or will merely retain the bill, with liberty for the plaintiff to proceed at law.[8] [218]

Secondly, **the equity extends to prohibit the continuance as well as the commission of a wrong.**[9] Where an interlocutory injunction is granted against the continuance of a nuisance, the abatement of which cannot be ordered on motion in direct terms, it becomes what is called a mandatory injunction, *i. e.*, an injunction so framed that it restrains the defendant from permitting his previous act to operate, and, therefore, virtually compels him to undo it.

Thirdly, **the equity extends to an account of the defendant's profits.** The equity for the account is strictly an incident to the injunction, and, therefore, if an injunction is refused, an account cannot be given; but the plaintiff must resort to a court of law.[1] [219]

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8. Hill v. Thompson, 3 Meriv. 622.

9. Lane v. Newdigate, 10 Ves. 194. See Bradbury v. Manchester R. R. Co., 5 De G. & Sm. 624.

1. See, generally, Joyce on Injunctions, §§ 812, 813, 897, 1188.

BOOK III.

OF THE JURISDICTION OF THE COURTS OF EQUITY IN CASES IN WHICH THE COURTS OF ORDINARY JURISDICTION CANNOT ADMINISTER A RIGHT.

CHAPTER I. [220]

OF ACCOUNT.[1]

The equities under the second head of our division, viz., where the courts of ordinary jurisdiction cannot administer a right, **are** those for **investigation of accounts,** for **severance of co-tenancies,** and other analogous relief, for **winding up partnerships,** and **administering testamentary assets,** for **adjusting liabilities under a common charge,** and for **protection of the persons and estates of infants and lunatics.**

One important instance of the jurisdiction over accounts occurs in the case of trustee and cestui que trust, where the *cestui que trust* demands an account of moneys received under the trust. A corresponding one exists as against an **agent or steward,** or a person employed in any similar character, who is bound by his office to render regular accounts. If this duty is performed, and the accounts are regularly rendered, his employer can recover the balance at law on the evidence of the accounts themselves, and a suit in equity is not required. [221] If it is neglected, he can recover damages at law for the neglect, and will also have an equity, arising out of the agent's failure in duty, to have the accounts taken in the Court of Chancery, where the evidence may be supplied by discovery on oath.[2] **A bill for an account by an agent against his principal will not generally lie;** for it is the agent's duty, and not the principal's, to keep the account.[3] But this rule is subject to **a special ex-**

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1. See the old common law action of account considered in Pleading, and in Eaton's Equity, 516.

2. See Eaton's Equity, 517.

3. See, however, contra, Ludlow v. Simond, 2 C. C. E. 1, 39, 53; Kerr v. Steamboat Co., 1 Chevers, 2d part, 189.

ception in favor of a steward, the nature of whose employment is such that money is often paid in confidence without vouchers, embracing a variety of accounts with the tenants, so that it would be impossible to do him justice without an account in equity.

In taking the account against an **agent,** he **will be charged with the moneys of his principal which he has actually received, and, if a special case of negligence be made out, with such moneys also as but for his wilful default he might have received.** If the agent neglect to account, he will be charged with **interest** on moneys improperly retained; if he has unduly used his principal's moneys for the purpose of profit to himself, he will be charged with the **profits which** he has made; and if, by his neglect, his own property has become mixed up with that of his principal, so that they cannot readily be distinguished, **the burden of separation** will be thrown on him, and the whole will be treated as belonging to the principal, until the agent shows clearly what portion is his own.[4] [222]

Another instance of the jurisdiction is in the case of **mutual accounts, where items exist on both sides, not constituting mere matters of set-off,** but forming a connected transaction, and requiring an account to ascertain the balance, more complicated than can practically be taken at law. **The mere fact that such complicated mutual accounts exist is a sufficient equity to sustain a bill.**[5] But it is otherwise with respect to mere matters of set-off; for right of set-off can be effectually tried at law, and can only be transferred to Chancery by some special equity.

The right of set-off is that right which [not at common law but by statute][6] **exists between two persons, each of whom, under an independent contract, owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction, so that in any action brought for the**

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4. Lupton v. White, 15 Ves. 432, 441.

5. Kerrington v. Houghton, 2 N. C. C. 620; Long v. Majestre, 1 John. Ch. 305.

6. Consult the statutes of your own state.

larger debt, the residue only after such deduction shall be recovered.

If the cross demands are of legal cognizance, the right of set-off is also legal; and unless one of the demands involves an equitable element, their existence creates no equitable element, their existence creates no equity for resorting to the Chancery. [223] If one or both be matter of equitable cognizance, as, for example, if there be a question of trust or fraud, the set-off may be enforced in the Court of Chancery.

The right of account is not a right to amalgamate independent cross demands, for the purpose of enabling one action or suit to suffice; but it assumes that the several demands have no independent existence, but have been so connected by the original contract or course of dealing, that the only thing which either party can claim is the ultimate balance. **The only right, therefore, is that of taking the account**; and the forms of procedure, both at law and in equity, are framed for that purpose. An account of this kind is not confined to mere receipts and payments of money, although it ordinarily occurs in that form. [224] But **it is applicable to any dealings which have been treated as equivalent to receipts and payments.** An account, for instance, will lie in respect of reciprocal deliveries of goods, provided that in the course of dealing between the parties, such deliveries have been treated as items in an account, and not as creating mere cross demands.[7]

The remedy at law on a mutual account is in ordinary cases by **assumpsit** for the balance, and, in the case of account between merchants, by the **action of account.**[8]

The difficulties existing at law in the above-named actions are effectually obviated by the procedure in equity. [225] A foundation is first laid for all necessary inquiries by the **discovery** elicited from the defendant's answer. **The account is then referred to a master,** who is armed with power not only to **examine witnesses,** but also to **examine the**

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7. Cottam v. Partridge, 4 Man. & Gr. 271. See Smith v. Marks, 2 Rand. 449.

8. See Pleading.

parties themselves, and to **compel production of books and documents.** It is not liable to interruption by controversies on particular items, but is carried on continuously to its close. **The master reports the final result to the court. The report may be excepted to** on any points which are thought objectionable, and all such points are simultaneously re-examined by the court, and either at once determined, or, if necessary, referred back to him for view. [226] **As soon as the report is finally settled and confirmed, a decree is made** for payment of the ultimate balance.[9] If the interests of other persons are entangled in the account, the court may require that they be made **parties** to the suit, or may direct, if necessary, the institution of **cross suits;** and thus, having all their interests before it, may so modify a single decree, as effectually to embrace and arrange them all.

If the account is one which might be readily investigated by a jury, [in a proceeding at law] it seems that in that case **no equity will arise.**[1]

If there has been an account stated between the parties, it may be pleaded as a bar to both discovery and relief, or may be set up by answer as a bar to relief.[2]

The account, however, may be opened on the ground of fraud, or if important errors are specified and proved; but a general allegation that it is erroneous will not suffice. In some cases where a stated account is impeached, the court will reopen the whole and direct it to be taken *de novo.* [227] In others, when it is faulty in a less degree, it will allow it to stand, with liberty to **surcharge and falsify.** This leaves it in full force as a stated account except so far as it can be impugned by the opposing party. If he shows the omission of a credit, that is a surcharge; if he shows the insertion of an improper charge, that is a falsification.[3] The question of **what will constitute a stated ac-**

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9. See, generally, as to the practice in the master's office, Hoffman's Masters in Chancery; Barbour's Chancery Practice, and Daniels' Chancery Pleading & Practice.

1. Monk v. Harper, 3 Edw. Ch. 109.

2. Weed v. Small, 7 Paige, 573.

3. See Seton on Decrees, 48; note, Adams' Equity (Am. Ed.), *227.

count is in some measure dependent on the circumstances of the case. **The mere delivery of an account, without evidence of contemporaneous or subsequent conduct, will not prove it to be a stated account; but an acceptance, implied from circumstances, will suffice** [*e. g.*, retaining it an unreasonable time without objection].

It is also material to the equity for an account that it be **claimed within the proper time.** Where the account is sought under a legal title, or under an equitable title of like nature with a legal one, that limit of time will be adopted in equity which is prescribed by the statute of limitations at law. When the bar of the statute is inapplicable, there may nevertheless be a bar in equity, originating in **long acquiescence** by the party, and in the consequent presumption that he has either been satisfied in his demand, or that he intended to relinquish it.[4] [228]

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4. It is generally held that an account rendered, not objected to in a reasonable time, becomes an account stated. Brown v. Van Dyke, 4 Halst. Ch. 795; Thompson v. Fisher, 13 Pa. St. 313.

CHAPTER II. [229]

OF PARTITION.— OF ASSIGNMENT OF DOWER.— SUBTRACTION OF TITHES.—ASCERTAINMENT OF BOUNDARY.—PAYMENT OF RENTS.

The equity for the severance of co-tenancy and other analogous relief originates in the fact that the co-tenants have a rightful unity of possession, and that its severance cannot be adequately effected at law. It is most frequently applied in effecting partition between co-owners, but its principle extends to suits for assignment of dower and for relief against subtraction or non-payment of tithes.[1]

The inconvenience of the remedy at law by writ of partition originated a concurrent jurisdiction in equity, the exercise of which may be demanded as matter of right, notwithstanding the difficulties by which a division may be embarrassed, or the mischief which it may entail on the property. [230] **Parties having limited interests,** as, for example, tenants for life or years, **may,** if they please, **have a partition in equity,** as well as at law, in respect of their own interests only. **But if a complete partition be desired, all parties interested may be brought before the court,** and all estates, whether in possession or expectancy, including those of infants and of persons not *in esse*, may be bound by the decree. The defendant's titles need not be proved by the plaintiff, but may be ascertained by a reference to the master; and the partition itself, being effectuated by mutual conveyances, may be made in a more convenient form. [231] **Its general principle is of course the same as that of a partition at law, viz., a division of the estate;** but if the estate is not susceptible of an exact division, **an allotment** may be made in unequal shares, **with compensation** for the inequality by creation of a rent or charge. A partition, however, must be *bona fide* made, and the pecuniary charge confined to corrections of inequality. There cannot, under the name of such correction, be substituted a mere

1. In England and in most of the states partition is now regulated by statute. Consult the local statutes. Eaton's Equity, 607.

sale to one co-tenant; and, therefore, if the estate consists of a single house, the entire house must be divided, however inconvenient such division may be.

The mode in which a partition is effected in equity is, that after the interests of all parties have been ascertained, either by evidence in the cause, or by the master's report, a **commission** is issued to persons nominated by the parties, or if necessary by the court, directing them to enter on and survey the estate, to make a fair partition thereof, to allot their respective shares to the several parties, and to make a return of their having done so to the court. The commissioners in making their division are guided by the principles already explained. After making it, they allot to the several parties their respective shares; and in doing this they ought to look to their respective circumstances, and to assign to each that part of the property which will best accommodate him.

The return of the commissioners, when made, is confirmed by the court. The **confirmation,** however, does not, like the judgment on a writ of partition, operate on the actual ownership of the land, so as to divest the parties of their undivided shares, and reinvest them with corresponding estates in their respective allotments, but it **requires to be perfected by mutual conveyances**; and the next step, therefore, after confirmation of the return, is a **decree** that the plaintiffs and defendants do respectively convey to each other their respective shares, and deliver up the deeds relating thereto, and that in the meantime the allotted portions shall respectively be held in severalty. [232] If any of the co-owners have settled or mortgaged their shares, directions will be given for framing the conveyance so that all parties shall have the same interests in the divided shares, which they before had in the undivided shares. If the infancy of the parties or other circumstances prevent the immediate execution of conveyances, the decree can only extend to make partition, give possession, and order enjoyment accordingly until effectual conveyances can be made. If the defect arises from infancy, the infant must

have a day after attaining twenty-one years to show cause against the decree.[2]

In addition to the decree for a partition, the court may also, if either of the co-owners have been in the exclusive reception of the rents, decree **an account** of his receipts. But the mere fact of his having occupied the property will not of itself make him liable for an occupation rent; for the effect of such a rule would be that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff, and prevent him from occupying them, except upon the terms of paying rent.[3]

The equity for assignment of dower originates, in like manner with that for partition, out of the unity of possession of the widow and heir. [233]

The inconveniences attending assignment of dower at law, coupled with the difficulties to which the dowress was exposed, by reason of her evidence being in possession of the heir, gave rise to a concurrent jurisdiction in equity for issuing a commission to set out her dower, or making a reference to the master for the same purpose.[4] [234]

At the same time with the decree for assigning dower, **an account** might, before the late statute, 3 & 4 Wm. IV. c. 27, sect. 40, have been directed **of the rents and profits** received since the husband's decease, and payment of one-third to the widow.

The equity for relief against subtraction or non-payment of tithes originates in the fact that the tithes, with the remaining produce, continue rightfully in possession of the tithe-payer, who is bound to set them apart and to account for them to the tithe-owner; and it is accordingly an equity against the tithe-payer alone, and not against any third person

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2. See, generally, Eaton's Equity, 606, 610; Barbour's Chancery Practice; Hoffman's Masters in Chancery.

Independent of statute, courts of equity cannot decree a sale; but by statute in England and most of the states sales may now be decreed in partition cases without the consent of the co-tenants. Eaton's Equity, 611.

3. See, however, Hitchcock v. Skinner, 1 Hoff. Ch. 21.

4. Courts of chancery have concurrent jurisdiction with courts of law in assigning dower. Eaton's Equity, 615; Herbert v. Wren, 7 Cranch, 370. Consult the local statutes for statutory remedies.

who may have received the tithes under an adverse claim. [Not applicable to this country.]

The equity for ascertainment of boundary arises when lands are held in severalty by independent proprietors, but the boundaries have been confused by the misconduct of the defendant, or of those under whom he claims. [237] In such case, the court will issue a **commission** to ascertain the boundaries, or will set out an equivalent portion of the lands in the defendant's possession. It will, at the same time, if necessary, decree an **account** of rents and profits.[5]

The equity for payment of rent arises where, by confusion of boundaries, by fraudulent removal of goods, or by the incorporeal nature of the hereditaments charged, the remedy at law by distress is gone, without default in the owner of the rent. [238] A bill seeking this relief may be supported merely by proof of long-continued payment, and is then termed a bill founded on the *solet*. The same remedy has been given where the days on which the rent was payable were uncertain, and even where the nature of the rent (of which there are many kinds at law) was unknown.[6]

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5. Wake v. Conyers, 1 Eden, 331.

6. See Dawson v. Williams, 1 Freem. Ch. 99 (distress evaded or obstructed by fraud); Lawrence v. Hammitt, 3 J. J. Marsh. 287 (the lease in this case had been lost).

CHAPTER III. [239]

OF PARTNERSHIP.[1]

Before the interest of an individual partner in the firm assets can be known, an account must be taken of the business, the assets, and the liabilities, so that the divisible surplus may be ascertained. **If it be necessary to investigate this partnership account, it cannot be done at law unless by the adoption of the action of account.**[2] [240] **If a dissolution as well as an account be sought, the common law jurisdiction is altogether excluded.**

The incapacity thus existing in the courts of law confers a jurisdiction on the Court of Chancery; and accordingly, **if the partnership has been already dissolved, or if there be misconduct or incompetency in either partner sufficient to warrant its dissolution, a bill will lie to have the assets converted into money, the debts discharged out of their produce, and the surplus distributed among the partners, or the deficiency made good by contribution.**[3]

There may of course be grounds for relief under general equities, at the suit of one partner against another, independently of this special equity for taking the account. The subject, however, of these general equities is not now under consideration. Our present subject is, **the special equity for winding up a partnership on the ground that the account cannot be taken at law.** And the essential characteristic of this equity is that **it contemplates the winding up of the partnership, and not its continuance.** [241] A bill will not lie for an account and distribution of the profits, which contemplates at the same time a continuance of the business. The ordinary course is to pray that the partnership may be dissolved, and the surplus assets distributed; but this practice has been relaxed in favor of joint-stock companies, and of other numerous partnerships,

1. The subject of Partnership will receive separate treatment later on in this volume. See Partnership.

2. See Pleading.

3. *Ex parte* Ruffin, 6 Ves. 119.

and bills have been sustained which asked more limited relief, viz., that the assets of an abandoned or insolvent partnership might be collected and applied in discharge of the debts, leaving questions of distribution and contribution as between the partners entirely open for future settlement.

1. **As to the circumstances which will cause or warrant a dissolution.**

A dissolution may be caused in various ways: first, **by mere effluxion of the time, or completion or extinction of the business** for which the partnership was created; secondly, **by mutual agreement** of all the partners, or, if no specific term of duration has been fixed, by the **declaration of any one partner** that the connection is dissolved;[4] and thirdly, **by the death**[5] **or bankruptcy** of a partner, or by an **execution against him, followed by seizure and sale of his share.** And when a dissolution is thus effected, the executor or administrator of the partner, the assignee under his fiat, or the sheriff's vendee, becomes entitled to his interest in the partnership assets, as it shall appear on adjustment of the partnership account.[6] [242]

A partnership may also be in some sense dissolved by **sale of a partner's share,** if such sale be authorized by the deed of partnership. The ordinary rule is, that **no partner can sell or dispose of his share without the concurrence of the rest. He may alien his interest in the surplus to be ascertained by taking the partnership account, but he cannot substitute his alienee to the position of a partner,** nor give him any right to interfere in the business. A right, however, to alien the share itself may be, and in the case of very large partnerships often is, conferred. And the effect of such alienation, when properly made, is to determine the relation of partnership as between the alienor and the other members of the firm, and to substitute a similar relation with the alienee.[7] This power of alienation is

4. Peacock v. Peacock, 16 Ves. 49.
5. Caldwell v. Stileman, 1 Rawle, 212.
6. Taylor v. Fields, 4 Ves. 396.
7. Young v. Keighly, 15 Ves. 557.

usually confined to joint-stock companies, and regulated by the provisions of express statutes.

A decree for dissolution will be warranted if it is impossible that the partnership should be beneficially continued, *e. g.*, if the principles on which the scheme is based are found on examination to be erroneous and impracticable; if one partner excludes or claims to exclude the other from his proper share of control in the business, of if, though not in terms excluding him, he is so conducting himself as to render it impossible that the business should be conducted on the stipulated terms; if he is dealing fraudulently with the business or assets of the partnership; or if he is incapacitated by incurable lunacy from performing his own part in the partnership business. [243] The lunacy of a partner does not *per se* amount to a dissolution; but if it be not a mere temporary malady, but a confirmed state of insanity, without a fair prospect of speedy recovery, it will warrant a decree for the purpose; and the partnership will be dissolved as from the date of the decree.[8]

2. Assuming a dissolution to be proved or decreed, the next topic for consideration is **the mode of winding up the concern.**

The first step is, that **the partnership debts should be ascertained, and the assets applied in their discharge.**[9] If the parties cannot agree on the intermediate management, whilst the process of dissolution is going on, a receiver may be appointed to conduct it. **But the court cannot permanently carry on the business, and will not, therefore, appoint a receiver, except with a view to getting in the effects and finally winding up the concern.**[1] **If, after applying the assets, there are still outstanding liabilities, the partners must contribute in proportion to their shares; if, on the other hand, a surplus remains, it will be distributed among them in like proportion.**

The proportions in which the partners are respectively entitled or liable are determined by the original terms of

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8. Beaumont v. Meredith, 3 Ves. & B. 180.

9. Rodiguez v. Heffernan, 5 John. Ch. 417.

1. Waters v. Taylor, 15 Ves. 10.

their contract; or, in the absence of any express declaration on the point, by a reasonable presumption from the circumstances of the case.[2] If, subsequently to the commencement of the business, **advances** had been made to the firm, or **moneys drawn out** by any partner, beyond his due proportion, their shares in the distribution will be modified accordingly. [244] If such sums have been advanced or received by way of increase or diminution of capital, they will introduce a new element in the division of profits; if by way of loan to or from the partnership, they will not affect the division of profits, but will be dealt with on the footing of loans in the final settlement of the account. The distinction, however, is confined to the account as between the partners themselves, and does not affect the creditors.

In order to effectuate the realization of assets, the payment of debts, and the distribution of surplus, the court has an authority over partnership estate which does not exist in other cases of common ownership, that of directing its sale and conversion into money.[3] The effect of the equity to insist on such a sale, where **real estate** is held by the partnership and a dissolution has been caused by death, is to raise a question of **equitable conversion** between the real and personal representatives of the deceased partner. [245] The legal ownership will of course devolve according to the limitations in the conveyance; but the equitable interest of the deceased partner in the surplus, so far as it is referable to the real portion of the assets, will devolve on his heir or his executor, according as the equity for sale is confined to satisfaction of the liabilities, or extends to distribution among the partners. **The doctrines on this point appear to be as follows:** first, that **if there be any express contract or declaration by the partners, the question will be determined by it;** secondly, that **if real estate be purchased with partnership funds for partnership purposes, the conversion into personal estate is absolute;** thirdly, that **if it be not purchased with partnership funds, but, being**

2. Equally, if there is no stipulation on the subject. Jones v. Jones, 1 Ired. Eq. 332.

3. Sigourney v. Munn, 7 Conn. 11.

the property of one or more partners, be devoted, either partially or entirely, to the partnership business, the extent of conversion depends on the intention. And it must be determined from the circumstances of the particular case whether that intention was to convert it *in toto,* both as to the liability for debts and also as to the destination of the surplus, or to confine it to subservience to the business during its continuance, and to a liability for the debts after dissolution; fourthly, that **if, though purchased out of the partnership fund, it has not been purchased for partnership purposes, but has been intended as an investment of surplus profits, it is in fact taken out of the business, and belongs to the individual partners as their separate property, according to its unconverted character;**[4] and lastly, that **the conversion, when it operates at all, operates in favor of the personal representative alone,** and does not create a liability to probate duty in favor of the crown, which is a stranger to the converting equity. [246]

If, after a partnership has been dissolved by death or bankruptcy, the assets are used by the surviving or solvent partner for the purposes of profit, he is in the same position as any other fiduciary holder of property using it for his own benefit, and is liable at the option of the executors or assignees to account for the profits which he has made.[5]

In addition to the general jurisdiction over partnership, **there is also a jurisdiction over mines and collieries held by several persons as co-owners,** on the ground of what may be termed a **quasi partnership.** [247] The working of mines has always been considered as a species of trade; and if each owner were to deal separately with his separate share, and to have a separate set of miners going down the shaft, it would be practically impossible to work the mine at all. For this reason it is held upon general principles, without reference to the particular circumstances of any case, that where tenants in common of a mine or colliery cannot agree in its management, the court will appoint a **receiver** over the whole, notwithstanding some of the co-owners may dissent.

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4. See note, Adams' Equity (Am. Ed.), *246 and cases cited.

5. Waring v. Cram, 1 Parsons' Sel. Eq. Cas. 522.

CHAPTER IV. [248]

OF ADMINISTRATION OF TESTAMENTARY ASSETS.

The equity for adminstering the assets of a testator or intestate does not authorize the Court of Chancery to try the validity of a will. The jurisdiction for that purpose in regard to wills of personal estate belongs to the ecclesiastical courts [or courts succeeding to their jurisdiction], and in regard to wills of real estate, to the courts of common law. **Even fraud, practised on a testator in obtaining a will, is insufficient to create a jurisdiction in equity.**[2] If, indeed, the fraud be not practised on the testator himself, but on an intended legatee, *e. g.*, if the drawer of a will were to substitute his own name for that of the legatee, or were to promise the testator to stand as trustee for another, so that the question raised does not affect either the validity of the will or the propriety of the grant of probate, equity may decree a trust. Or if it be practised, not in reference to the will itself, but to its subsequent establishment by the Ecclesiastical Court, *e. g.*, by fraudulently obtaining the consent to a revocation of the probate. [249] But if the fraud were practised on the testator in obtaining the will, so that the contest really is whether the will ought to be proved, the proper course is to oppose the grant of probate, and there appears to be no jurisdiction in equity to relieve.

If, however, there be a trust to perform or assets to administer, so that the will is drawn within the cognizance of equity, **there is an incidental jurisdiction to declare the will is established,** after first directing an issue *devisavit vel non*,[3] to try its validity at law.[4]

The issue of devisavit vel non when a declaration of es-

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1. Consult the local statutes.

2. Eaton's Equity, 285. Consult the local statutes.

3. Did he devise or not.

4. "According to the modern authorities, a bill to establish a will may be filed by a devisee in possession against an heir who has brought no action of ejectment, although no trusts are declared by the will, and although it is not necessary to administer the estate under the direction of the Court of Chancery." Bisp. Eq., § 574.

tablishment is asked, is demandable as of right by the heir; for he can be disinherited only by the verdict of a jury.

Assuming the right of a personal or real representative to be established, there is an **equity for administering the assets of the testator or intestate,** originating in the inefficacy of the ordinary tribunals.[5] [250]

In exercising the jurisdiction to administer assets, all such assets as would be recognized at law are termed legal assets, and are administered in conformity with legal rules, by giving priority to debts in order of degree, as follows, viz.: 1. Debts due to the crown by record or specialty, which have priority over all other debts, as well of a prior as of a subsequent date; 2. Certain specific debts which are by particular statutes to be preferred; 3. Debts by judgment or decree, and immediately after them debts by recognizance of statute; 4. Debts by specialty; but if the bond or covenant be merely voluntary, it will have priority over legacies only, and will be postponed to simple contract debts *bona fide* owing for valuable consideration; 5. Debts on simple contract, as on bills or notes and agreements not under seal, on verbal promises, and on promises implied by law.[6] [252]

There are also other assets, recognized in equity alone, which are termed **equitable assets,** and **are distributed among the creditors pari passu, without regard to the quality of their debts.**[7]

Legal assets may be **defined as** "those portions of the property of a deceased person of which his executor or heir may gain possession, and in respect whereof he may be made chargeable, by the process of the ordinary tribunals, and without the necessity of equitable interference." They consist, first, of the **personal estate,** to which the executor or administrator is entitled by virtue of his office; and secondly, of the **real estate descended or devised,** except where the devise is for payment of debts; a devise of this latter kind rendering the estate equitable instead of legal assets. [253]

The common law rule as to the liability of real estate restricted such liability within a narrow compass. The leasehold estates of the debtor were included in his personalty, and were of course liable for all the debts. But his freeholds were only liable for debts by specialty, expressly

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5. In this country this jurisdiction is usually exercised by the Courts of Probate, Orphans' Courts, or Surrogate Courts, which for this purpose are vested with the jurisdiction formerly exercised by the English Ecclesiastical Courts and the Court of Chancery. In some of the states, however, the jurisdiction in equity still exists.

6. See the statutes of the several states as to the order of priority in this country.

7. The distinction between legal and equitable assets is of no practical importance in this country; all assets are practically legal.

naming the heirs; and if the descent were broken by a devise, or if the heir aliened before action brought, there was no proceeding at law or in equity by which that realty could be affected.[8]

In addition to the two kinds of legal assets, the personal and the real, already mentioned, there is also a third kind, which though not obtainable without the intervention of equity, and therefore not in strictness legal assets, is yet, when obtained, to be administered as such, viz., **property held by a trustee for the testator.** [254] For although the benefit of the trust, if resisted, cannot be enforced without equitable aid, yet **the analogy of law will regulate the application of the fund.**

Equitable assets may be defined as those portions of the property which by the ordinary rules of law are exempt from debts, but which the testator has voluntarily charged as assets, or which, being non-existent at law, have been created in equity.

Equitable assets of the **first class** consist of **real estate devised for or charged with the payment of debts.** If a testator devises land for payment of his debts or subject to a charge for such payment, the devise operates to destroy the original liability, and to subject the land to a new liability by way of trust. [255] The same rule does not apply to a bequest of personalty, for such a bequest is a mere nullity as against creditors, and does not affect the common law liability.

Equitable assets of the **second class** consist of **interests either in personal or real estate which, being non-existent at law, have been created in equity;** and the principal assets of this class are **equities of redemption.** So long as the right of redemption exists at law, it is not divested of the character of legal assets. If, after forfeiture, a reversion remains, to which the equity of redemption is incident, such equity will follow the character of the reversion, and will still constitute legal assets. If, after forfeiture, there is no reversion, as, for example, when a fee simple is mortgaged in fee, a different rule prevails; for there is nothing left in the mortgagor which can be assets at law, and the new interest is a mere creation of equity. [256] It has therefore been determined, notwithstanding some doubts on the point, that such interests be equitable assets.

Where an estate consists of both legal and equitable assets, the rule is, that if any creditor has obtained part payment out of the legal assets by insisting on his preference, he shall receive no payment out of the equitable assets, until the creditors, not entitled to such preference, have first received an equal proportion of their debts. [257]

The manner of administration in equity is on a bill filed, either by creditors or by legatees, praying to have the accounts taken and the property administered; or if no creditor or legatee is willing to sue, then by the executor

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8. This injustice has been remedied by statute both in England and in this country. See the statutes for details.

himself, who can only obtain complete exoneration by having his accounts passed in chancery, and is therefore entitled to insist on its being done. **The more usual course** is that of a bill by one or more creditors on behalf of all.[9] [258] **The decree** on such a bill is for a general account of the debts and for an account and application of the personal assets. If the personal estate should prove insufficient, a decree will be made against the realty.

A legatee may file a bill for his single legacy, or on behalf of all the legatees for payment of all. But he cannot in either case have a preference over the rest.[1]

Immediately on the executor's answer being obtained, the balance which he admits to be in his hands is secured by **payment into court.** [259] A **receiver** of the outstanding personalty, and of the rents and profits of the real estate, is appointed if the circumstances render it necessary. And as soon as the cause can be brought to a hearing, a decree is made for **taking the accounts.**

The decree is not confined to the payment by the plaintiff, but **directs a general account and administration,** under which all creditors and legatees may claim. And, therefore, if separate proceedings be afterwards carried on, **the assets will be protected by the court** from that needless expense by injunction or order, as the case may require.

When the assets have been secured and their administration has been undertaken by the court, the next step is their **distribution.** The method adopted for this purpose is, to **refer it to the master to take an account** of the personal estate not specifically bequeathed, either got in by the executor or still outstanding, and of the funeral and testamentary expenses, debts and legacies; and to direct payment of the expenses and debts in a course of administration, and afterwards of the legacies. [261]

In order to ascertain who the creditors are, a direction is given for publishing **advertisements** in those quarters where they are most likely to be found. [262] The same course is pursued where a distribution is to be made among next of

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9. McKay v. Green, 3 John. Ch. 56.

1. See Pritchard v. Hicks, 1 Paige Ch. 270.

kin, or where a legacy is given to a class of persons, so that it is necessary to ascertain of whom the class consists. A time is fixed by these advertisements, within which the parties are to make their claims. After the expiration of that time **the master reports the claims** which have been established; and the court, by the decree on further directions, authorizes a **distribution** of the fund among them, and protects the personal representative against any future claim.

The prima facie order of application of the assets is as follows: 1. Personal estate not specifically bequeathed; 2. Real estate devised for payment of debts; 3. Real estate descended; 4. Personal and real estate specifically bequeathed or devised, subject to a charge of debts by will; 5. Personal and real estate specifically bequeathed or devised, subject to a charge of debts by mortgage, to the extent of such mortgage; 6. Personal and real estate specifically given, and not charged with debts. If the personalty and the *corpus* of the real estate are inadequate, the heir or devisee may be charged with bygone rents. [263]

1. It has been stated that **the fund first liable is the personal estate not specifically bequethed.** The proposition would perhaps be more accurately worded by confining it to the general residue after deduction of all particular legacies. For although pecuniary legacies connot be conveniently set apart in the outset, and the decree, therefore, exempts the specific legacies alone, yet if the effect of discharging the debts is to exhaust the personalty, the pecuniary legacies will be made good out of the other assets.

2. **The primary liability of the personal estate may be transferred to any portion of it specified by the testator, as between the several objects of his bounty,** though not as against the creditors' right over the whole. Or it may be, to the same extent, transferred from the personal to the real estate, if the intention to exonerate the personal estate be expressed in the will, or be manifestly implied therein. But the presumption is against the intention to exonerate, and in favor of considering the real estate as an auxiliary fund.

3. [A point of statutory construction not applicable to this country.]

4. **The liability of assets of the fifth class, viz., mortgaged property,** appears to be that mortgaged estates, of whether devised or descended, shall be liable for payment of the mortgage debts, as assets which the testator has expressly charged, but that their liability shall be subordinate to that of assets charged by will; because the fact of such a charge being made by the testator denotes his intention to exonerate the estate. [264] They are accordingly liable in the hands of a devisee, as a fund for payment of the particular debt, immediately after property charged with debts, and specifically given subject to the charge. On the other hand, the liability is prior to that of property given without a charge, including general pecuniary legacies, but exclusive of a mere residuary gift; because a residuary gift denotes no intention of bounty, except as subject to all legal charges. If a mortgaged estate descend to the heir, it will be liable as assets by descent after land devised for payment of debts.

In order, however, to charge any other assets in priority to the mortgaged estate, it is essential that the mortgage debt be originally a personal one, and that it be so in reference to the testator himself, so that the land is merely liable as a collateral security. If the land were originally the primary fund, *e. g.*, if a jointure or portion be charged on land, with a collateral covenant to make it good; or if it has become the primary fund in reference to the testator, *e. g.*, if he acquired it subject to the charge, and has not assumed the charge as his personal debt, the devisee or heir is clearly liable. [265]

The doctrine respecting mortgaged estates applies also to legacies of chattels pledged by the testator, or which at the time of his death were subject to a charge.

5. In regard to assets of the fourth and sixth classes, where both personal and real estate are included, a question has arisen, whether the personal and real estate should contribute *pro rata*, or whether the personalty is first liable. It has been determined that in both cases there is a liability *pro rata*, and that, accordingly, if land be devised, and the

testator die indebted by bond, a specific legatee may compel the devisee to contribute.[2]

2. General administration suits in equity are recognized in the United States courts when the parties are citizens of different states. They are also recognized in a few states where the powers of the probate courts are insufficient; but in most states no suit in equity will lie for a general accounting and administration of the estate nor to compel the payment of a debt, legacy or distributive share of the estate, till after the debt, legacy or distributive share has been decreed payable by the probate court and then only when the plaintiff is not entitled to sue therefor at law. The question in every instance turns on the provisions of the statutes in each state. Croswell, Executors and Administrators, 503-505 and cases cited. See, also, note, Adams' Equity (4th Am. Ed.), *263.

CHAPTER V. [267]

OF CONTRIBUTION, EXONERATION, AND MARSHALLING.

The equities of contribution and exoneration arise where several persons are bound by a common charge not arising ex delicto, and their order of liability has been accidentally deranged. If the liabilities be joint, he who has paid more than his share is entitled to contribution from the rest. If some are liable in priority to the rest, the parties secondarily liable, if compelled to discharge the claim, are entitled to exoneration.[1]

In order that either of these equities may arise, **it is essential that the charge be binding, and that it do not arise ex delicto.**

The **voluntary act** of one party in expending money for the benefit of all, will not create a right to contribution. There is an **exception** in favor of houses and mills, and of the necessary repairs which they require.[2] [268]

If the liability arise ex delicto, there is no right to contribution.[3] But it is otherwise with respect to mere breaches of trust not involving any actual fraud. In such cases, each defaulting trustee is severally liable to the *cestui que trust* for the whole loss; but contribution may be enforced as between the trustees themselves; and if any third person has knowingly reaped the benefit of the breach of trust, the loss may be eventually cast on him.[4]

The rights now under consideration are acknowledged both at law and in equity, and so far as the machinery of the common law will allow, may be enforced in an action. **But the means of enforcement at law are very limited;** for in addition to the impossibility, common to all classes of account, of obtaining discovery on oath or satisfactorily investigating the items, there are other special difficulties,

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1. See Eaton's Equity, 59, 470, 510; Campbell v. Messier, 4 John. Ch. 334.

2. A tenant in common is not entitled to charge his co-tenant with a proportion of the expenses incurred for the benefit of the common property. Carver v. Miller, 4 Mass. 559; 4 Kent. Com. 370.

3. Peck v. Ellis, 2 John. Ch. 131.

4. Lingard v. Bromley, 1 Ves. & B. 114.

originating in the necessity of suing each party liable in a separate action, which renders it difficult to insure verdicts for the true ratable shares, and disables the court, where one of several contributors proves insolvent, from distributing the consequent loss ratably among the rest.[5]

The two equities of contribution and exoneration are both exemplified in the case of suretyship: the one by the rights of sureties as between themselves; the other by their rights as against the principal.

The right of contribution arises between sureties where one has been called on to make good the principal's default, and has paid more than his share of the entire liability. [269] If all the sureties have joined in a single bond, the general rule, in the absence of any express or implied contract, is that of equality; if their liabilities have been created by distinct bonds, the contribution is in proportion to the respective penalties.[6]

The equity for contribution between sureties is also applicable to **underwriters or insurers**, where the owner of property has made two or more insurances on the same risk and the same interest. In this case, the law will not allow him to receive a double satisfaction for a loss; but if he recover the entire loss from one set of underwriters, they may have a ratable contribution from the rest.

The right of exoneration arises between surety and principal so soon as the surety has paid any part of the debt. Immediately on making such payment, he may bring assumpsit at law against his principal for indemnity.[7] **And he may also sue the creditor in equity for an assignment of any mortgage or collateral security for the debt,** so that he may, as far as possible, be substituted in his place.[8] But he cannot have an assignment of the debt itself, for that is determined by his own payment, and a new debt is due from his principal to himself.

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5. See Viele v. Hoag, 24 Vt. 46.

6. See, generally, Rees v. Berrington, 2 Lead. Cas. Eq. p. ii. 366; note, Adams' Equity (4th Am. Ed.), *268; Eaton's Equity, 470, 510.

7. The surety may sue in equity to compel the principal to pay the debt at any time after it becomes due before payment by him and though he has not yet been sued by the creditor. Hayes v. Ward, 4 John. Ch. 123; Eaton's Equity, 510 and notes.

8. See Eaton's Equity, 470, 510.

Another instance of contribution occurs where mortgages or other incumbrances require discharge, and the property bound by them is not absolutely vested in a single person; *c. g.*, where different parcels of land are included in the same mortgage, and are afterwards sold to different owners, or where a mortgaged estate, or a renewable leasehold, is held for life or in tail, with remainders over, or has devolved upon a dowress and the heir. [270] In these cases, the burden is to be borne by the parties interested according to the value of their respective interests, and the benefit which they actually derive from its discharge.[9] And although the creditor himself is not bound by this equity, but may proceed against whom he will, yet if he wilfully render its enforcement impossible, as by discharging one of several coparceners, he cannot proceed for the whole debt against the others, but at the most can only require from them their respective shares. If the burden has been already discharged by one of the parties liable, he will be entitled to contribution from the rest, unless he has shown an intention to exonerate the estate.

The doctrine of general average is another illustration of the equity for contribution. The circumstances under which this equity arises are where a ship and cargo are in imminent peril, and a portion is intentionally sacrificed for the security of the rest. [271] The rates of contribution in such cases are generally settled by arbitration, but the parties are not compellable to refer, and may have recourse to an action at law or a suit in equity.[1]

The equity of marshalling arises where the owner of property subject to a charge has subjected it, together with another estate, to a paramount charge, and the estate thus doubly charged is inadequate to satisfy both the claims. In this case, if the paramount charge be by way of mortgage, the only resource for the puisne mortgagee is to redeem it, and then to tack it to his own debt, but it is only a charge payable out of the produce of the estate, and not

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9. Williams v. Craig, 2 Edw. Ch. 297; Hays v. Ward, 4 Rand. 272; note, Adams' Equity (4th Am. Ed.), *270.

1. Birkley v. Presgrave, 1 East, 220; Sturgess v. Cary, 2 Curtis C. C. 59.

conferring on the paramount creditor a right to foreclose, an equity arises for marshalling the security, so that both creditors may, if possible, be paid in full. [272] The equity is a personal one against the debtor, and does not bind the paramount creditor, nor the debtor's alienee for value.

The equity is not binding on the paramount creditor, for no equity can be created against him by the fact that some one else has taken an imperfect security. **But it is an equity against the debtor himself,** that the accidental resort of the paramount creditor to the doubly charged estate, and the consequent exhaustion of that security, shall not enable him to get back the second estate discharged of both debts. If, therefore, the paramount creditor resorts to the doubly charged estate, the puisne creditor will be substituted to his rights, and will be satisfied out of the other fund, to the extent to which his own may be exhausted. And it seems that **he may, on proposing just terms, require the paramount creditor to proceed against the estate on which he has himself no claim.** His right, however, to do this is not an independent equity against the creditor, but a mere incident of his equity against their common debtor; and, therefore, if the paramount claim is not chargeable on two funds, both belonging to the same debtor, but is merely due from two persons, one of whom is also indebted to separate creditors, there is no equity to compel a resort to one rather than to the other, or to alter the consequences of the election which may be made.[2]

The equities of contribution, exoneration, and marshalling are applied, in the administration of assets, to rectify disorders which may incidentally occur, by which some portion of the estate has paid more than its share, or where claims, for which several funds were liable, have been so paid as to exhaust a fund which alone was applicable to another claim. [274]

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2. "Where one person has a clear right to resort to two funds, and another person has a right to resort to but one of them, the latter may compel the former, as double creditor, to exhaust the fund on which the latter as a single creditor, has no claim." Eaton's Equity, 513; Webb v. Smith, 30 Ch. Div. 192; note, Adams' Equity (4th Am. Ed.), *272 and cases cited.

CHAPTER VI. [278]

OF INFANCY, IDIOCY, AND LUNACY.

The last equity which remains for notice is **the equity for administering the estates and protecting the persons of infants, idiots, and lunatics.**[1]

The protection of an infant's person and estate is to some extent provided for in the ordinary course of law; viz., by right of **guardianship,** extending sometimes to the person alone, and sometimes to both the person and estate.[2] The estate is also in many instances protected by being vested in **trustees** with express powers of management and application; in which case their conduct will be regulated under the ordinary jurisdiction over trusts.

The superintendence of the guardianship in respect of the person, so as to discharge from illegal custody or to protect from cruelty or ill usage by the legal guardian, is exercised by the Court of Queen's Bench on **writ of habeas corpus.** [280] The same writ is issuable out of the Court of Chancery; but the jurisdiction under it is the same as at common law, and the court can attend to nothing except illegal custody, cruelty, and ill usage.

The superintendence of the guardianship in respect of the estate, so as to secure a due accounting by the person in possession, is by action of **account** at law, or suit for account in equity. [281]

The means of protection already enumerated, although available for the prevention of positive misconduct, **are inadequate to secure a proper education of the infant, or a prudent management of his estate. And for these purposes there is a prerogative in the crown, as parens patriae, to be exercised by the Court of Chancery, for protection of any infant residing either temporarily or permanently**

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1. These subjects are generally regulated by statute in this country, and the jurisdiction is exercised by probate courts or other courts of similar jurisdiction.

2. As to the several kinds of guardianship, see either the text or Blackstone, vol. 1, of this series.

within its jurisdiction. The possession of property is not essential to the existence of this authority, though the want of it may create a practical difficulty in its exercise, by incapacitating the court from providing for the infant's maintenance.[3]

The mode of calling the jurisdiction into operation is by filing a bill, to which the infant is a party. This constitutes him a ward of court; and after he is once a ward, any subsequent matter may be determined on petition or motion. If the infant is in illegal custody, an order for his delivery to the proper guardian may be made on petition without bill; and if the father is dead, the appointment of a guardian and an allowance for maintenance may be obtained in the same way. But if the receiver of the estate is wanted, or a compulsory order on trustees, or if there be complicated accounts, a bill is necessary.

The principal incidents of wardship are three in number; viz.:—

1. **The ward must be educated under the superintendence of the court.** [282] When an infant has been made a ward, he cannot be taken out of the jurisdiction of the court without its leave.

The manner in which the superintendence is exercised[4] differs according as there is or is not a subsisting guardian.

If the father is dead, and there is no legal or statutory guardian, or none who is able or willing to act, a guardian will be appointed, and **a scheme of education** settled by the court. In settling such scheme, the court will regard, as far as possible, the wishes of the deceased father. And it will more especially do so in regard to religion, by bring-

3. Where there exists a Court of Chancery, it still exercises a general jurisdiction over every guardian and has a general supervisory power over the persons and estates of infants. Matter of Andrews, 1 John. Ch. 99; Preston v. Dunn, 25 Ala. 507; Westbrook v. Comstock, Wash. Ch. 314. See, generally, Eyre v. Shaftsbury, 2 Lead. Cas. Eq. (1st Am. Ed.), p. 1.

131. The management and control of the estates of infants is, however, ordinarily exercised by probate, orphans', surrogates' or other court of similar statutory creation and jurisdiction. Consult the local statutes.

4. See, generally, the statutes of the several states regulating the subject of guardianship, etc.

ing up the infant in the creed of his family, if not contrary to law, and if he has not been already educated in another. If there is a father or legal guardian within the jurisdiction able and willing to act, the matter will be left to his direction, subject to the general control of the court. If the father or legal guardian has voluntarily relinquished his right, or has forfeited it by misconduct tending to the infant's corruption, the court will restrain him from interfering, and will appoint some other person to act as guardian in his place. [283]

2. **The ward's estate must be managed and applied under the superintendence of the court.** [284] If there are no trustees within the jurisdiction able and willing to act, the court will appoint a **receiver.** If there are such trustees, they will not be superseded, except for misconduct; but a guardian is in this respect different from a trustee, and his power of management will not exclude a receiver. In cases where a **trust** exists, the degree of authority, as well as the manner of its exercise, will depend on the terms of the instrument creating it. In other cases the court is thrown on its inherent jurisdiction, and has **authority to manage the estate during minority, and to apply its proceeds for the infant's benefit.** In exercising its superintendence over a ward's estate, **the court will make a reasonable allowance for maintenance, provided the ward be entitled absolutely to a present income, and the allowance be for his benefit.** [286] The expenditure for this purpose is generally confined to income, and is rarely permitted to break in upon capital. But the capital may be applied for the advancement of the child in life. Where the infant is living with his father, or after the father's decease, with the mother, remaining unmarried, maintenance will not be allowed if such father or mother be of ability to maintain him, *e. g.*, to maintain him suitably to his expectations, and according to the parent's condition in life, without injury to his other children. [287]

The manner of maintaintence is by allowing a gross annual sum, proportioned to the age and rank and to the

fortune of the infant, without inquiring, unless on special grounds, into the details of expenditure. [288]

3. **The ward's marriage must be with the sanction of the court. In order to obtain such sanction, the court must be satisfied that the marriage is a proper one; and if the ward be a female, that a proper settlement is made.**[5] The marriage of an infant ward, without permission of the court, is a criminal **contempt** in all parties except the infant. If the infant be a female, the husband will be compelled, by imprisonment, to make a proper **settlement** of her property, and will be excluded, either wholly or in proportion to his criminality, from deriving any personal benefit out of his wife's fortune, so far as can be done without injury to her. If the ward has attained twenty-one, the marriage is not a contempt; but so long as her property continues under the control of the court, she will retain an equity for a settlement, dischargeable only by her personal consent in court. [289] There is no jurisdiction to settle the real estate of a female infant or personal estate to which she is entitled for her separate use; it is confined to her personal estate in possession.

The jurisdiction to protect persons under mental incapacity extends to all persons, whether subjects of the crown or not, whose persons or property are within the local limits of the jurisdiction. [290] The persons for whose benefit it exists are divided into two classes: viz., **idiots,** who have had no glimmering of reason from their birth, and are therefore by law presumed never likely to attain any; and **lunatics,** or persons of unsound mind, who have had understanding, but have lost the use of it, either with or without occasional lucid intervals, and by reason of its loss have become incapable of managing their affairs.

The jurisdiction in lunacy is exercised, not by the Court of Chancery in a regular suit, but by the Lord Chancellor personally on petition; and the appeal, if his order be erroneous, is to the king in council, and not to the House of Lords.

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5. Consult the local statutes.

The origin of the distinction in this respect between infancy and lunacy seems referable to the fact that the crown, in the event of idiocy or lunacy, has not a mere authority to protect, but an actual interest in the land of the idiot or lunatic, determinable on his recovery or death. If the owner is an idiot, the profits are applied as a branch of the revenue, subject merely to his requisite maintenance; if he is a lunatic, they are applied on trust for his support, and the surplus is to be accounted for to himself or his representatives. [291] In either case there is an interest vested in the crown, and requiring for its administration a special grant. The duty of such administration is committed by special warrant to an officer of the crown, who is usually, though not necessarily, the person holding the Great Seal. By virtue of this warrant, the custody of the estate and person is afterwards granted to committees, whose conduct is superintended by the Chancellor.

The existence of a vested interest in the crown introduces also the additional distinction, that the mere lunacy does not originate the jurisdiction, but that it must be first inquired of by a jury, and found of record, in accordance with the rule of law wherever a right of entry is alleged in the crown.

The regular course is to issue a commission under the Great Seal in the nature of a writ de lunatico inquirendo, to ascertain whether the party is of unsound mind. [292] The granting of such commission is discretionary with the Chancellor, who in exercising his discretion will look solely to the lunatic's benefit.

The proceedings under the commission are regulated by statute. Their general outline is, that a jury is empanelled and sworn; the witnesses and the supposed lunatic, if he thinks fit to be present, are examined; and the inquisition is engrossed, and after signature by the commissioners and jury, is returned into chancery. If the lunatic subsequently recover, the commission may be superseded; but for this purpose the lunatic must in general be personally examined, and his sanity fully established.

On a return of non compos being made, the custody of the estate and person is granted to committees, with a proper allowance for maintenance. [293] If no one is willing to become committee of the estate, a **receiver** may be appointed, with the usual allowance.

The duty of the committee or receiver of the estate is to manage the lunatic's property with care, to bring in and

pass his accounts, and to pay and invest the balances at such times as the superintending officer (called the master in lunacy) shall direct. [294] In cases requiring the exercise of discretion, it is not usual to act without previous investigation by the court, through a master in chancery.

The principle on which the lunatic's estate is managed is that of looking to the lunatic's interest alone, and acting as an owner of competent understanding would do, without regard to his eventual successors. [296] The effect of such management may in some instances be to alter the property from real to personal, or *vice versa; e. g.*, by cutting timber on the real estate, or by paying out of the personalty for repairs or improvements. And if such alteration be made, the property will devolve, on the lunatic's death, in accordance with its altered character, and not in accordance with that which it previously bore. It is otherwise in the case of an infant. But in the case of a lunatic, the rule must be understood with this guard, that nothing extraordinary is to be attempted; *e. g.*, estates to be bought, or interests disposed of. [297] Alteration of property is to be avoided, so far as is consistent with the proprietor's interest.

The same principle, of looking to the lunatic's advantage alone, is pursued in fixing the **amount of the maintenance**; and provision therefore may be made for modes of expenditure which are substantially for the lunatic's benefit, though they may not be such as he is legally bound to incur.

If after due allowance for the lunatic's maintenance there is still a disposable surplus of his estate, such **surplus may be applied in payment of his debts**; and on a petition by a creditor, a reference will be made to inquire what debts there are, and how they should be discharged; but there is no instance of paying the debts without reserving a sufficient maintenance, although the creditors cannot be restrained from proceeding at law.

On the death of the lunatic, the power of administration is at an end, except as to orders which have been already made, or which are consequential on reports or petitions already made or presented. [298] But the committee con-

tinues under the control of the court, and will be ordered on the application of the lunatic's heir to deliver up possession of the estate.[6]

6. The custody and care of the persons and estate of lunatics are provided for in most and probably in all the states by statutes, the courts exercising this jurisdiction being the same ones exercising jurisdiction over infants. The unabridged text may, however, be profitably read by the students and in many instances will by analogy throw light on more modern methods of management. See, also, Ewell's Lead. Cases (1st Ed.).

BOOK IV.

OF THE FORMS OF PLEADING AND PROCEDURE BY WHICH THE JURISDICTION OF THE COURTS OF EQUITY IS EXERCISED.[1]

CHAPTER I. [299]

OF THE BILL.

The object of the common law courts in their original structure was to reduce the litigation to a single issue, and to obtain from the appropriate tribunal a decision on that issue; from the court on an issue of law, from a jury on an issue of fact. By statutory enactment, several distinct issues, both of law and fact, may now indeed be raised in the same action, but each issue must be kept separate, and cannot be prayed in aid of the others. In accordance with this principle, the pleadings are framed, first, for the production of single or separate issues; secondly, for keeping separate the law and the fact.[2]

In the Court of Chancery the system is different. [301] **The object there aimed at is a complete decree on the general merits,** and not that the litigation should be reduced to a single issue; and as all issues, whether of law or fact, are decided or adjusted for decision by the court, it is not essential to keep them strictly distinct. The rules, therefore, of pleading are less stringent than at law, but they are equally regulated by principle; and in order to secure adherence to such principle, **every pleading, except the formal**

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1. Equity pleading and practice, as distinguished from common law pleading and practice, is still the regular procedure in quite a number of the states of the Union, among others in Illinois, Michigan, New Jersey, and Tennessee. It is also used in the United States courts. It is important, therefore, that this book should be understood by the student. Reference is made generally to Daniels' Chancery Pleading & Practice, Story's Equity Pleading, Barbour's Chancery Pleading & Practice, and Puterburgh's (Ill.) Chancery Pleading & Practice; Curtis' Equity Precedents; Seton's Forms, and Hoffman's Masters in Chancery.

2. See Pleadng.

replication, must be sanctioned by the signature of counsel.

The commencement of a suit in equity on behalf of a subject is by preferring a bill, in nature of a petition, to the Lord Chancellor or other holder of the Great Seal, or if the seal be in the king's hands, or the holder of it be a party, to the king himself in his Court of Chancery. **This is termed an original bill,** to distinguish it from other bills filed in the course of a suit to remedy defects and errors. **If the party injured be an infant or a married woman**[3] suing separately from her husband (unless the husband be banished or has abjured the realm), **it is preferred by a person styled the next friend,** and named in the record as such. **If he be a lunatic or idiot, it is by the committee** of his estate, or sometimes by the Attorney-General on behalf of the crown as the general protector of lunatics.[4]

If the suit be on behalf of the crown, of those who partake of its prerogative, or of those whose rights are under its particular protection, as, for example, the objects of a public charity, **the complaint is preferred by the Attorney or Solicitor General, and the bill is not one of petition or complaint, but of information** to the court of the wrong committed. [302] If the suit does not immediately concern the rights of the crown, its officers generally depend on the relation of some person, termed the relator, who is named on the record as such, and is answerable for the costs; and if such relator has a personal ground of complaint, it is incorporated with the information, and they form together an information and bill. **An information differs from a bill in little more than name and form,** and will therefore be considered under the general head of bills.

An original bill or information consists of five principal parts: viz., 1. **The statement;** 2. **The charges;** 3. **The interrogatories;** 4. **The prayer of relief;** and 5. **The prayer of process.**[5]

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3. Emancipated in many states. See local statutes.

4. Always consult the local statutes before bringing suit.

5. It was formerly stated that nine distinct parts were requisite in every original bill, viz.: 1. The address; 2. The introduction; 3. The premises or stating part; 4. The confederating part; 5. The charging part; 6. The

The statement of a bill is prefaced by the heading, addressing it to the holder of the Great Seal, the terms of which are from time to time prescribed by the court. It then commences with the words: "Humbly complaining, showeth unto your lordship, your orator," etc., giving the name, description, and place of abode of the plaintiff, and, if necessary, of the next friend, committee, or relator, and then narrating the case for relief. **Its object is to show the right to relief.**

It must state a consistent case on behalf of all the plaintiffs; for if their claims are inconsistent, or any of them have no claim, the misjoinder will be fatal to the suit; or, at all events, the court will only make such a decree as will leave their claims in respect to each other wholly undecided.

It must state the case in direct terms and with reasonable certainty; not necessarily with the same technical precision as at law, but with sufficient precision to show that there is a definite equity.[6] [303] And if the equity depends on a title to property in the plaintiff, the statement must show a sufficient title in point of law. If the title, as stated, would have been valid at common law, and regulations have been superadded by statute, it is not essential, though usual, to state compliance with them.

It is not, however, requisite to state matters of which the court takes judicial notice, such as public acts of parliament, the general customs of the realm, and so forth; although, for the sake of convenience, they are often introduced.

The charges of a bill ought not to include, and generally do not include, any narrative of the case for relief, but are generally used for collateral objects: *e. g.*, for meeting the defence by matter in avoidance, or by inquiries to sift its

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jurisdictional clause; 7. The interrogating part; 8. The prayer for relief; and 9. The prayer for process. See these nine orderly parts of a bill in chancery, stated and considered in Puterburgh's (Ill.) Chancery Pleading & Practice (4th Ed.), 43 *et seq.* See, also, form of foreclosure bill at end of this Book 4.

6. See the premises or stating part well considered in Puterburgh's Chancery Pleading & Practice (4th Ed.), 44 *et seq.* See, also, Story's Equity Pleading, §§ 27 *et seq.*; 1 Barbour's Chancery Practice, 38.

truth; for giving notice of evidence which might otherwise operate as a surprise; and for obtaining discovery as to matters of detail which could not be conveniently introduced in the statement. The charges of a bill are in reality supplemental to the statement, and might have been included in the statement itself, but that for convenience' sake they are subsequently introduced, and are distinguished by a peculiar form of commencement. [306] In fact, in many bills, where the circumstances of the case present no danger of intricacy, the whole of the allegations are comprised in the statement, and the charges are omitted.[7]

The statement and charges of a bill include all its allegations, and no allegations ought in strictness to be inserted in them which are not material for some of the purposes pointed out, viz., either as establishing the plaintiff's case, rebutting that of the defendant, or obtaining discovery for one of these purposes. If any matter be alleged which is not material, whether as irrelevant *in toto* or as being matter of which the court will take judicial notice, it is in strictness **impertinent,** and may be struck out of the bill on application to the court;[8] and if it be criminatory of the defendant or of any other person, it is also objectionable on the ground of **scandal.** But provided it be material, however harsh the charge may be, it cannot be treated as scandalous. It should also be observed that, even if the statement be material, yet **excessive prolixity will be impertinent;** as, for instance, if instead of giving the effect of a document, a plaintiff, without any sufficient motive, were to copy it at length.

In many of the older precedents we find an allegation intervening between the statements and the charges, called **the charge of confederacy.** This is an allegation that the defendants are confederating with certain unknown parties to refuse justice to the plaintiff. And we find also another allegation following the charging part, called **the averment of jur-**

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7. See, generally, Puterburgh's Chancery Pleading & Practice (4th Ed.), 55; Story's Equity Pleading, § 33.

8. See Reeves v. Baker, 13 Beav. 436; Hawley v. Wolverton, 5 Paige, 522.

isdiction, which alleges that the plaintiff can only obtain his remedy in the Court of Chancery. The probability is that these forms originated in the once doubtful state of the jurisdiction; at the present time they are unnecessary, and are fast falling into disuse.[9] [307]

The interrogatories are a series of questions intended to obtain discovery in aid of the plaintiff's case, and must be directed to facts previously stated or charged. They are prefaced by a prayer that the defendants may, if they can, show why the plaintiff should not be relieved, and may answer on oath such of the interrogatories afterwards numbered and set forth, as by a note at the end of the bill they are respectively required to answer. The numbered interrogatories follow, and at the foot of the bill a note is added informing each defendant which of them he must answer.

The old bills in chancery contained no special interrogatories, but merely required that the defendant should answer the bill, and he was bound without further questioning to answer the whole. The interrogatories were afterwards added, to prevent misapprehension or evasion.[1]

The fourth part of the bill is the prayer for relief, or, as it would be more correctly termed, the statement of relief required. [308] The only portion of a bill which can be accurately called a prayer, is the concluding part, or **prayer of process,** calling on the court to issue the *subpoena.* After the statements and charges are completed, the bill does not go on to say, "your orator therefore prays that he may have such and such relief;" but it says, "to the end, therefore, that the defendant may answer the interrogatories, and that your orator may have the specified relief, may it please your lordship to grant a writ of *subpoena,* requiring the defendant to appear by a certain day, and to answer

9. See the new United States chancery rules and the rules of practice promulgated by the supreme courts of the several states, where chancery pleading and practice is retained. These rules have the same effect as statutes so far as procedure is concerned.

1. The general interrogation in a bill is sufficient to entitle a plaintiff to a full answer to all the matters stated in the bill. Puterburgh's Chancery Pleading & Practice (4th Ed.), 57; Jaques v. Methodist Church, 1 John. Ch. 75.

the bill, and abide the decree of the court." The only thing which the court is asked to do, or which can be called a prayer, is " to grant the writ."

The old bills in chancery did not contain any special statement of relief, but only what is called **the prayer for general relief**: viz., " that your orator may have such relief in the premises as the nature of the case may require, and to your lordship shall seem fit." [309] It is said that such a prayer would still be sufficient;[2] but the uniform practice is to insert a special prayer, and to conclude with the prayer for general relief.[3]

2. Puterburgh's Chancery Pleading & Practice (4th Ed.), 59.

3. Id.; Story's Equity Pleading, §§ 40-43.

In order that the student may see to what extent the foregoing forms are still retained in practice we insert a draft of a bill of foreclosure as used in Illinois:

BILL TO FORECLOSE MORTGAGE.

State of Illinois, } ss.:
County of Cook, }

The Circuit Court of Cook County, in Chancery sitting.

To the November Term, A. D. 1914.

To the Judges of said Court, in Chancery sitting:

Your orator, John Jones, of the city of Chicago, in the county of Cook, respectfully represents unto your honors, that on or about the first day of September, A. D. 1910, Henry James of the city of Evanston in said county, became and was indebted to your orator in the sum of one thousand dollars ($1,000), and being so indebted, in consideration thereof, the said Henry James on that day made and executed under his hand one certain promissory note for the sum of one thousand dollars payable with interest at the rate of six per cent. per annum (payable annually) one year from the date thereof, and then delivered said note to your orator as will more fully appear by the said note, ready to be produced in court, and by the copy of the same herewith filed and marked "Exhibit A," and made part of this, your orator's bill of complaint.

Your orator further represents unto your honors, that, to secure the payment of the principal sum and interest above mentioned, the said Henry James, who was then and there unmarried, by his deed, dated the first day of September, A. D. 1910, conveyed to your orator and his heirs forever in fee simple, the following described parcel of land, with its appurtenances, situate in the county of Cook and state of Illinois, to wit: Lot three in block four of Kedzie's addition to the city of Evanston, according to the recorded plat thereof, together with the two-story brick dwelling house thereon, subject, however, to a condition of defeasance upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said promissory note; which said mortgage was, on the day of its date, duly acknowledged, and afterwards, on the

This latter prayer **can never be safely omitted,** because if the plaintiff should in his special prayer mistake the due relief, it may be given under the general prayer, if con-

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said first day of September, A. D. 1910, recorded in the recorder's office of the said county of Cook, at 4 o'clock in the afternoon of said day, in Book 100 of Mortgages, on page 555, as by the said mortgage and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and by a copy thereof herewith filed and marked "Exhibit B," and made a part of this bill, will more fully appear.

Your orator further represents unto your honors, that the sum of one thousand dollars with interest from the first day of September, A. D. 1910, is now due and unpaid to your orator on the said note and mortgage, and in said mortgage it was expressly agreed that in case of the foreclosure of said mortgage by proceedings in court, or in case of any suit or proceeding at law or in equity wherein said mortgagee, his executors, administrators or assigns should be a party plaintiff or defendant by reason of his being a party to said mortgage, he or they should be allowed and paid their reasonable costs, charges, attorneys' and solicitors' fees in such suit or proceeding by the said mortgagor, and the same should be a further charge and lien upon said premises under said mortgage, to be paid out of the funds of the sale thereof, if not otherwise paid by said mortgagor; and your orator claims that by the filing of this bill, under this clause in said mortgage, there is now due your orator for solicitors' fees two hundred ($200) dollars, in addition to the sum above mentioned, and that no proceedings at law have been had to recover the above-mentioned debt secured by the said note and mortgage, or any part thereof.

Your orator further represents and charges that the said premises described in said mortgage are meager and scant security for the said sum of one thousand dollars and interest mentioned in said note and mortgage, and now due your orator, and that said mortgagor, under the false pretence of improving said premises, threatens to tear down and remove the materials comprising the rear wing of said house and has already commenced to do the same; that the pretence of improving said premises, is, according to the best knowledge, information and belief of your orator, made simply for the purpose of selling the materials so removed and not with the intention of making any improvement whatever, and that the effect of said removal of materials will be to greatly impair the value of your orator's security for the payment of said promissory note.

And your orator further represents unto your honors and states upon information and belief, that Thomas Jenkins of the city of Chicago has or claims to have some interest in the said mortgaged premises, or some part thereof, as purchaser or otherwise, which interest, if any, has accrued subsequent to the lien of the said mortgage of your orator and is, therefore, subject thereto.

Your orator, therefore, asks the aid of this honorable court in the prem-

sistent with that which is actually prayed. If it be inconsistent, it cannot be obtained; and, therefore, **if the plaintiff doubt as to the proper relief, he may frame his prayer in the alternative,** to have either one relief or the other, as the

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ises, and makes the said Henry James and Thomas Jenkins parties defendant to this bill, and to the end that they may be required to answer this, your orator's bill, according to the rules and practice of this honorable court, without oath, their answer on oath being hereby waived; that an account may be taken in this behalf by or under the direction of this court; that the said defendant Henry James, may be decreed to pay your orator whatever sum shall appear to be due him upon the taking of such account, together with solicitor's fees and the costs of this proceeding, by a short day to be fixed by the court; that in default of such payment, the said mortgaged property may be sold, as may be directed by the court, to satisfy the amount due your orator for principal and interest on the said promissory note and mortgage and solicitors' fees and for his costs of this proceeding; that in case of such sale and in failure to redeem therefrom, pursuant to the statute, the defendants, and all persons claiming through or under them subsequent to the commencement of this suit, may be forever barred and foreclosed of all right and equity of redemption in the said premises; that your orator may have execution against the said defendant Henry James for any balance that shall remain due to your orator of the principal and interest of said promissory note and mortgage, if the sale of said mortgaged premises as aforesaid fails to produce sufficient to pay the whole of said mortgage debt and solicitors' fees and costs of this suit; and that your orator may have such other and further relief as the nature of his case may require, and as to this court shall seem agreeable to equity and good conscience.

(Here may be inserted a prayer for an injunction, or for an injunction and a receiver.)

May it please your honor to grant unto your orator the writ of summons in chancery, issuing out of and under the seal of this honorable court, directed to the sheriff of the said county of Cook, commanding him that he summon the said defendants Henry James and Thomas Jenkins to appear before the said court, on the first day of the next November term thereof, to be held at the court house in the county of Cook aforesaid, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as shall seem agreeable to equity and good conscience.

And your orator will ever pray, etc.

JOHN JONES.

WIRT J. BAXTER,

Solicitor for Complainant.

State of Illinois, }
County of Cook, } ss.:

On this fifteenth day of September, in the year one thousand nine hundred and fourteen, personally appeared before me a notary public in and for said county, John Jones, who, being duly sworn, saith that he is the complainant in the foregoing bill of complaint and that he has read

court shall decide.[4] In the case of charities and infants, the proper directions will be given, without regarding the language of the prayer.

The principal rules as to this portion of the bill are, that it should point out with reasonable clearness what relief is asked; that it should not combine distinct claims against the same defendant; and that it should not unite in the same suit several defendants, some of whom are unconnected with a great portion of the case. If the prayer is objectionable on either of the two latter grounds, the bill is termed multifarious.

Multifariousness of the first kind, sometimes called a misjoinder of claim, is where the plaintiff has several distinct claims against the same defendant, and prays relief in a single suit in respect to all. The court, on the ground of convenience, will not permit such a joinder. [310] **But the rule, being one of convenience only, is not absolutely binding,** and may be dispensed with if the claims be so far connected that a single suit is more convenient. A converse principle restrains the plaintiff from unduly splitting up a cause of suit.

Multifariousness of the second kind is where a plaintiff, having a valid claim against one defendant, joins another

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the foregoing bill of complaint, by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated to be upon his information and belief, and as to those matters he believes it to be true.

JOHN JONES.

Subscribed and sworn to
before me this 15th day of
September, A. D. 1914.

WILLIAM SMITH,
Notary Public in and for
said county.

(My commission will expire Jan. 1, 1916.)

Indorsed: "Gen. No..... Term No. ....."

Cook county. Circuit Court. In Chancery.

John Jones v. Henry James and Thomas Jenkins.

Bill to foreclose mortgage.

Filed this 16th day of September, A. D. 1914, Michael Sullivan, clerk.

(Mem.—A copy of the note marked "Exhibit A," and of the mortgage marked "Exhibit B," should be attached to the bill, as stated therein.)

Wirt J. Baxter, Solicitor for Complainant."

4. Puterburgh's Chancery Pleading & Practice, 59; Story's Equity Pleading, § 41.

person as defendant in the same suit, with a large part of which he is unconnected. In this case, as in the preceding one, if the nature of the transactions make a single suit convenient, the objection will not be sustained.[5]

The fifth and last part of a bill is the prayer of process, which asks that a writ of subpoena may issue, directed to the parties named as defendants, and requiring them to appear and answer the bill, and to abide by the decree when made. [311] **If a writ be wanted besides the subpoena,** *e. g.*, a writ of injunction or *ne exeat regno*, **such additional writ is asked in the prayer of process.**[6] In bills for discovery, or to perpetuate testimony, the words " to abide by the decree " are omitted, as well as the prayer for relief; but if the bill be for discovery in aid of a defence at law, it asks an injunction against proceeding at law until the discovery shall be made.

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5. See Puterburgh's Chancery Pleading & Practice (4th Ed.), 50-53; 1 Daniels' Ch. Pr. 437; 1 Barbour's Ch. Pr. 40; note, Adams' Eq. (4th Am. Ed.) *309; id., *310.

6. A bill containing no prayer for process and unsigned by counsel has been held demurrable. Wright v. Wright, 4 Halst. Ch. 143. Want of such signature alone, however, is ground for a motion to strike from the files but not for demurrer. Grove v. Potter, 4 Sand. Ch. 403.

CHAPTER II. [312]

OF PARTIES.

The persons against whom process is asked are the defendants to the bill, and should consist of all persons interested in the relief sought who are not already joined as plaintiffs. If no relief be sought, viz., if the bill be for discovery alone, it cannot be objected to for want of parties; but if relief be asked, the prayer of process must be so framed as to bring all persons interested in that relief before the court, either as plaintiffs or as defendants. In equity, it is only requisite that the interests of the plaintiffs be consistent, and it is immaterial that the defendants are in conflict with each other, or that some of their claims are identical with those of the plaintiffs. [313] Although, however, a conflict of interests among the defendants is no objection to a bill, yet it does not follow that the court will adjudicate on their conflicting claims. If there be no necessity arising out of the plaintiff's claim, the court will not adjudicate between co-defendants.[1]

If the suit be against a married woman, her husband must be joined as a party, unless he is an exile or has abjured the realm.[2] **If it be against an idiot or lunatic, the committee of his estate must be joined.**[3]

If a bill be filed either by or against uninterested parties, their joinder is sometimes spoken of as a fault in pleading; but it seems more correct to say that, **to the extent of such misjoinder, there is a failure on the merits,** and the suit will be dismissed accordingly.[4] [314] The only exception to this rule is in suits against a corporation, in which their clerk or other officer may be made a defendant, though un-

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1. See, generally, as to parties, 1 Barb. Ch. Pr. 37; Story's Eq. Pl. Ch. 4; 1 Daniels' Ch. Pr. Ch. 5; Barbour on Parties; Puterburgh's Ch. Pl. & Pr. (4th Ed.) 63 *et seq.*

2. See married women's acts in the several states.

3. Mitf. on Pleading, 30.

4. Objections for nonjoinder or misjoinder of parties should be taken by demurrer, plea or answer. If taken at the hearing their allowance is discretionary. Note, Adams' Equity (4th Am. Ed.), *314 and cases cited.

affected by the relief sought, in order that he may give discovery on oath, which the corporate body cannot do. If the bill be for discovery alone, in aid of proceedings at law, no person can be made a defendant who is not a party to the record at law.

With respect to the nature of the interest which requires a person to be joined in a suit, there is no difficulty as to persons against whom relief is expressly asked. But with respect to those who are incidentally connected with the relief asked against others, the interests which require such joinder seem generally referable to one of the three following heads: first, **interests in the subject-matter which the decree may affect,** and for the protection of which the owners are joined; secondly, **concurrent claims with the plaintiff, which if not bound by the decree, may be afterwards litigated;** and thirdly, **liability to exonerate the defendant or to contribute** with him to the plaintiff's claim.[5]

Sometimes compliance with the rule requiring the joinder of all interested parties is rendered practically impossible in a particular case, because the persons interested are too indefinite or numerous to be individually joined in the suit. [319] **In this case the rule admits of modification, so that one or more members of a class may sue or be sued on behalf of the whole,** provided the interest of every absent member in the claim made or resisted is identical with that of the members who are personally before the court. [320] The court, however, in such cases will not proceed to a decree until it is satisfied that the interest of all is fairly represented. In order, however, that the principle of the exception may apply, it is essential that the parties represented and those who profess to represent them should have strictly identical interests. [321] If that be not the case, but the suit be one which will bring into controversy their mutual rights, they must all be personally before the court.[6]

In cases where persons interested are out of the jurisdiction of the court, it is sufficient to state that fact in the

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5. See, generally, 1 Daniels' Ch. Pl., ch. 5.

6 See note, Adams' Equity (4th Am. Ed.), *320; Smith v. Swormstedt 16 How. 288; Whitney v. Mayo, 15 Ill. 251.

bill, and to pray that process may issue on their return; and if the statement be substantiated by proof at the hearing, their appearance in the suit will be dispensed with. The power of the court to proceed to a decree in their absence will depend on the nature of their interest, and the mode in which it will be affected by the decree. If they are only passive objects of the judgment of the court, or their rights are incidental to those of parties before the court, a complete determination may be obtained. But if they are to be active in performing the decree, or if they have rights wholly distinct from those of the other parties, the court, in their absence, cannot proceed to a determination against them.[7] [323]

7. In such cases, the statutes of the several states generally provide for notice by publication or substituted service. Consult the local statutes.

CHAPTER III. [324]

OF PROCESS AND APPEARANCE.

After the bill has been filed, it is next requisite that subpoena should be served; that the defendant should enter his apparance; and that after appearance he should put in his defence.

The defence may be of four kinds, Disclaimer, Demurrer, Plea, and Answer. But the most usual form, and the only one to which compulsory process applies, is that of answer.

The ordinary service of subpoena is by delivering a copy to the defendant personally, or leaving one at his place of actual residence.[1] And in special cases, where an absconding or absent defendant has a recognized agent in the matter litigated, **substituted service** on such agent has been allowed. **But as a general principle, the court has no inherent authority to dispense with service on the defendant himself, or to authorize any service beyond the limits of its own jurisdiction.**[2]

Assuming the subpoena to be duly served, the defendant must next appear. If he be contumacious and refuse, his disobedience may be punished as a contempt.[3]

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1. Consult local works on practice.

2. Service by publication or some form of substituted service is often authorized by statute.

3. *Appearance* is the formal proceeding by which the defendant submits himself to the jurisdiction of the court, and it was at one time absolutely necessary in every case, before any decree could be rendered against him. Where the defendant did not voluntarily obey the injunction of the writ of *subpoena* by entering his appearance, the chain of process hereafter described was resorted to for the purpose of compelling an appearance. To make the process of the court more effectual, there are, however, various statutory enactments, both in England and the different United States, providing that under certain circumstances *a decree pro confesso* may be rendered against nonresident, absconding, or contumacious defendants, founded upon the statements of the plaintiff's bill. The process for effecting a compulsory appearance has fallen into comparative disuse since the enactment of these statutes. Barton's Suit in Equity, 83, 84. A mere failure of the defendant to appear within the time limited by the rules of the court, whether such failure be by reason of neglect or contumaciousness will now warrant a decree *pro confesso*.

The process of contempt were originally five, viz.:—

1. **A writ of attachment** directed to the sheriff of the defendant's county, commanding that the defendant's person should be attached. On the return of *non est inventus*, the next process of contempt issued: [325]

2. **A writ of attachment, with proclamations.** Upon a return of *non est inventus*, there followed,

3. **A writ of rebellion** directed to commissioners appointed by the court, and extending into all the counties of England. Upon a return of *non est inventus*, there followed,

4. **An order that the serjeant-at-arms, as the immediate officer of the court, should effect the arrest.** If an arrest were made under this process, it was followed, like other arrests, by committal to the Fleet. But if the return was *non est inventus*, there was no further process against the person.

5. **A writ of sequestration** against the property of the defendant, issuable only on the return *non est inventus* of the serjeant-at-arms, or on a defendant in custody being committed to the Fleet. If the sequestration proved ineffectual, there was no further process.

In the case of a **corporation,** which cannot be attached, the first process was by **distringas,** and the second by **sequestration.** [326]

Assuming an appearance to be entered, an answer was next required; and if this were refused, the process of contempt was again enforced, but if resisted to a sequestration, the plaintiff was not restricted to that remedy, but on issuing the writ might apply to the court to **take his bill pro confesso,** and to decree against the defendant on the assumption of its truth.[4]

If a decree were ultimately made against the defendant, its performance was enforced by a like process of contempt, with the exception that the attachment was not bailable.[5]

In addition to other inconveniences of being in contempt, it has the effect of preventing a party from making any application to the court in the same cause, except for the purpose of clearing such contempt.

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4. Under the present practice in chancery, process of contempt would never be resorted to in such a case, unless a discovery under oath were necessary, but the bill would be taken *pro confesso*.

5. Process of contempt is available now for the purpose of compelling performance of the decree. See 1 Daniels' Ch. Pl. (3d Am. Ed.), 461.

CHAPTER IV. [331]

OF THE DEFENCE.

The grounds of defence in equity may be divided into six classes, viz.: —

1. **Want of jurisdiction in the court,** where the equity alleged is exclusively cognizable in some other court of equity, and not in chancery. 2. **Disability in the plaintiff to sue, or in the defendant to be sued.** 3. **A decision already made or still pending on the same matter** in the court itself, or in some other court of competent jurisdiction. 4. **Want of equity,** where no case is established on the merits. 5. **Multifariousness and unduly splitting up a cause of suit.** 6. **Want of parties.** The doctrines which affect the validity of each of these defences are not material to be here considered.[1] [332] Our present inquiry assumes a defence to exist, and is directed to the form in which it should be made.

The forms of defence are four in number: viz., **Disclaimer, Demurrer, Plea, and Answer.**

A disclaimer denies that the defendant has any interest in the matter.

A demurrer submits that on the plaintiff's own showing his claim is bad.

A plea avers some one matter of avoidance or denies some one allegation in the bill, and rests the defence on that issue.

An answer puts on the record the whole case of the defendant, whether by way of demurrer, of avoidance, or of denial, and whether raising one or more issues.

A defendant, however, is not necessarily confined to one of these forms of defence, but may use two or more of them against the same bill, provided he applies them to different parts, and distinctly points out the application of each. A class of cases also exists, in which the claim made by the bill is strictly single, and cannot therefore be met by several

1. See, generally, Story's Equity Pleading.

defences, in the sense in which the expression has just been used, but in which the bill itself is so constructed as to give rise to a peculiar defence, compound of plea and answer, and technically termed "**a plea supported by an answer.**" The nature of the defence will be considered under the head of Pleas.

1. **A disclaimer.** [333] If the plaintiff, demanding certain property, untruly state that the defendant has an interest therein, the defendant may put in a disclaimer of any right in the matter. If this be done, all controversy between himself and the plaintiff is at an end, and he may be either dismissed from the suit, or a decree made against him, according as the nature of the disclaimed interest and the plaintiff's security require. It seldom, however, happens that a disclaimer can be put in alone; for as it is possible that the defendant may have had an interest which he has parted with, or may have set up an unfounded claim, which may make him liable for costs, the plaintiff is entitled to an answer on those points.[2] Of course, **if the plaintiff is not merely seeking property which he believes the defendant to claim, but is actually charging the defendant as accountable for a wrong committed, a disclaimer cannot apply.**

2. **The principle of a defence by demurrer is that on the plaintiff's own showing, his claim is bad.** It is applicable to any defence which can be made out from the allegations in the bill, but the most ordinary grounds of demurrer are, want of jurisdiction, want of equity, maltifariousness, and want of parties.

The formal statement of the causes of demurrer, though usual, is not absolutely necessary, nor does the statement of one cause preclude the defendant from relying in argument on any others extending to the same part of the bill. [334]

Although a demurrer may be to the whole bill, it is not necessarily of that extent. It may be to the relief sought, it may be to the discovery, or it may be to both, or to only a part of one or of both. If it be to the whole relief, it will

2. See Mitford on Pl. 318; 1 Daniels' Ch. Pl. (3d Am. Ed.), 786.

necessarily extend to the discovery, and should be framed accordingly. If the demurrer be to a part only of the relief, it will not necessarily extend to the discovery. It may also happen that the demurrer will leave the relief untouched, and will extend only to the discovery or part of the discovery on the special ground that the subject-matter is one in which the defendant is not obliged to answer. But unless such special ground exists, the general rule is that the defendant cannot admit the right to relief, and at the same time demur to the discovery by which the relief is to be obtained. In all cases alike, the rule prevails, that the extent to which the demurrer is meant to be a defence should be distinctly pointed out. [335] And if the protection claimed be too extensive, the defence will fail. For **a demurrer cannot be good in part and bad in part**; but if it be general to the whole bill, and there be any part, either as to relief or discovery, to which an answer is requisite, the demurrer, being entire, must be overruled.

The principle on which a demurrer in equity is decided is the same which applies to a demurrer at law:[3] viz., that assuming the plaintiff's allegation to be true, he has not made out a sufficient case; and as it is therefore an invariable rule, that on argument of a demurrer all allegations of fact contained in the bill, except as to matters of which the court takes judicial notice, must for the purposes of the argument be deemed conclusive, a demurrer introducing contrary or additional averments is termed **a speaking demurrer,** and cannot be sustained. But if the allegations are inconsistent or uncertain, or if any material allegation be omitted, the construction on demurrer will be against the bill.

The course of procedure on demurrer depends upon the plaintiff's opinion of its validity. If he thinks that, as the bill stands, the objection is good, but that he can remove it by restating his case, **he may submit to the demurrer and amend his bill.** If he thinks the demurrer bad, **he may set**

3. See Pleading; Demurrer; 1 Daniels' Ch. Pl. (3d Am. Ed.), ch. 14, p. 564.

it down for argument.[4] If the demurrer is allowed on argument, the suit is at an end, unless the demurrer is confined to a part of the bill, or the court give permission to the plaintiff to amend. If it is overruled, the defendant must make a fresh defence by answer, unless he obtain permission to avail himself of a plea.[5] [336]

3. **The principle of a defence by plea is, that the defendant avers some one matter of avoidance, or denies some one allegation of the bill,** and contends that, assuming the truth of all the allegations in the bill, or of all except that which is the subject of denial, there is sufficient to defeat the plaintiff's claim. It is applicable, like a demurrer, to any class of objections;[6] but **the most usual grounds of plea** are: 1. **Want of jurisdiction;** 2. **Personal disability** in the plaintiff; 3. **A decision already made by the Court of Chancery,** or by some other court of competent jurisdiction, **or a suit already pending** in a court of equity respecting the same subject. But the suit must be pending in a court of equity. **If there be a pending action at law, the proper course is to put the plaintiff to his election by motion,** which court he will proceed in.[7] 4. **Want of equity,** where the equity depends on a single point.

Pleas of the first class, or those in which new matter is alleged in avoidance, are termed **affirmative.**[8] [337]

Pleas of the second class, or those in which an allegation of the bill is denied, are termed **negative pleas,** and are applicable when the plaintiff, by false allegation on one point, has created an apparent equity, and asks discovery as consequent thereon. In this case, a denial by answer would exclude the relief, but it would not protect the defendant from giving the required discovery. In order, therefore, to avoid such discovery, he must resort to a negative plea, and until the validity of his plea is determined, he will be protected from giving discovery consequent on the allegation.

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4. Id., pp. 618, 619.

5. Id., 623.

6. See, generally, 1 Daniels' Ch. Pl. (3d Am. Ed.), ch. 15, p. 630.

7. This is by virtue of the orders of May, 1845, 16, 20, 21, 15.

8. See note, Adams' Equity, (4th Am. Ed.), *337.

It is, however, very seldom that a pure negative plea can be made available. For although it protects against discovery consequent on the alleged equity, it does not protect against discovery required to prove it. If, therefore, there be any statements in the bill tending to prove the disputed allegation, distinct from such allegation itself, the discovery asked on those points must be excepted from the plea, and must be given by an answer in support.[9]

There is a third class of plea, which may be termed **the anomalous plea**, which is applicable when the plaintiff has anticipated a legitimate plea, and has charged an equity in avoidance of it: *e. g.*, when, having stated his original equity, he sates that a subsequent release was given, or is pretended by the defendant to have been given, and charges fraud in obtaining such release. In this case the release or other original defence may be pleaded with averments denying the fraud, or other equity charged in avoidance. It is obvious from the nature of the anomalous plea that it is only good against the original equity, and is ineffectual against the equity charged in avoidance; and, therefore, the allegations which constitute that equity must not only be denied by averments in the plea, in order to render the defence complete, but must in respect of the plaintiff's right of discovery be the subject of a full answer in support.[1]

Where an answer in support is not required, a plea to all the relief is a bar to all the discovery; for the discovery is only material in order to obtain the relief. [339]

If an answer in support is requisite, the part to which the plea applies must be distinctly shown, for the answer is necessary in determining the validity of the plea. If, therefore, the plea cover too much, and so prevent an answer on any material point, or if the answer, though in terms applying to all the requisite discovery, be substantially insufficient, the plea will be disallowed. And by the old practice, if the plea covered too little,— *e. g.*, if it did not cover so much of the bill as it might by law have extended to,— or

9. See Innes v. Evans, 3 Edw. Ch. 454.

1. Foley v. Hill, 3 M. & C. 475; Bogardus v. Trinity Church, 4 Paige, 178.

if the answer covered too much, and extended to some part overruled by the plea, in both cases the plea was bad. If an answer is not required in support, the plea is not vitiated by applying it to too large a portion of the bill, but may be allowed as to that part only to which it would properly extend.

A plea must be confined to a single issue.[2] It is not necessary that it should consist of a single fact. But it cannot include several defences.

The averments of a plea in chancery must have the same certainty as those of a plea at law. [341]

It is also necessary to the validity of a plea that it be verified by the defendant's oath.[3] The exceptions are where the matter pleaded is provable, not by evidence of witnesses, but by matter of record.

The course of procedure on a plea will depend on the view taken by the plaintiff as to the sufficiency in law, or the truth in fact, of the defence. If he thinks the plea valid, but that he can meet it by **amendment**, he may do so. [342] If he thinks it invalid, he may **set it down for argument.**[4] If he thinks it untrue, he may file a **replication**, and go to a hearing on the issue of its truth. If the plea be overruled on argument, the defendant must answer. Or the court may pursue an intermediate course by reserving the benefit of it till the hearing, or by directing it to stand for an answer with liberty for the plaintiff to except to its sufficiency. If it is allowed on argument, its validity is established, but the plaintiff may still file a replication, and go to a hearing on the question of its truth. He may sometimes, too, obtain permission to amend his bill; but this is not a matter of course after the allowance of a plea, and will only be granted on a special application. If the plea be replied to, either originally or after its allowance on argument, the cause will be brought to a hearing on the single question of its truth. If it is sustained by the evidence, there will be a decree for the defendant. If it is

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2. Sattus v. Tobias, 7 John. Ch. 214.

3. Wild v. Gladstone, 15 Jur. 713.

4. 1 Daniels' Ch. Pl. (3d Am. Ed.) 714 *et seq.*

disproved, he can set up no further defence, but a decree will be made against him.

4. **The defence by answer is the most usual, and generally the most advisable course. It puts on the record the whole case of the defendant,** enabling him to use all or any of his grounds of defence, subject only to the necessity of verifying them on oath; and **an objection which might have been made by demurrer or plea will in most cases be equally a bar to relief when insisted on by answer,** although it will not, as we have already seen, excuse the defendant from giving the discovery required by the bill.[5]

The answer sustains a double character. [343] It is first **a narrative of the defendant's case,** and secondly **a discovery in aid of the plaintiff.**[6] The averments of an answer, so far as it is a narrative of the defendant's case, are governed by the same rules as those of a bill, viz., they **must state the defence with reasonable certainty, and without scandal or impertinence.**

In so far as the answer consists of discovery, it is regulated by the principles already discussed under that head of jurisdiction: viz., **no defendant need discover matters tending to criminate himself,** or to expose him to penalty or forfeiture; no defendant need discover **legal advice** which has been given him by his professional advisers, or statements of facts which have passed between himself and them in reference to the dispute in litigation, and official persons must not disclose any **matter of state,** the publication of which may be prejudicial to the community; but **subject to these restrictions, every competent defendant must answer on oath as to all facts material to the plaintiff's case.** [344] **He must answer fully, if he answer at all:**[7] *i. e.,* he must either protect himself by demurrer or plea, or must answer every legitimate interrogatory, and he must answer distinctly, completely, without needless prolixity, and to the

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5. See, generally, 1 Daniels' Ch. Pr. (3d Am. Ed.), ch. 16, p. 723; 1 Barbour's Ch. Pr. 130.

6. The defendant must answer all the facts charged in the bill. 1 Barbour's Ch. Pr. 130, 131.

7. That is to matters well pleaded. 1 Barbour's Ch. Pr. 133.

best of his information and belief. He is not, however, bound to answer as to conclusions of law, nor as to conclusions of fact, when the evidence only is within his knowledge, and not the fact which it tends to prove.

After the answer is put in, the next step in procedure regards the question of its sufficiency: viz., whether the defendant has given all due discovery. [345] If he has not, the plaintiff may except. **The exceptions** are signed by counsel, and are delivered within a limited time to the proper officer. If the defendant does not submit to the exceptions, they **are referred to one of the masters** for consideration; and if he **reports** the answer insufficient, a further answer must be filed on the points excepted to. If either party is dissatisfied with the master's decision, he may bring the question before the court by **exceptions to the report**, and it will then be finally decided.[9]

The next step, after the sufficiency of the answer is determined, is the amendment of the plaintiff's bill. [346] Before the answer is filed, the plaintiff may amend as often as he thinks fit; but after an answer, he is precluded from doing so, until its sufficiency or insufficiency is admitted or determined. If the answer be insufficient, he is remitted to his former right of amending at discretion. If it be sufficient, he is entitled as of course to one order for amendment, but any subsequent order must be obtained on special grounds. **The object of amendment may be either to vary or add to the case originally made, or to meet the defence by new matter.**[1] The old method of doing this was by a special replication, followed up, if necessary, by rejoinder, surrejoinder, etc., according to the forms of pleading at law. But the modern practice is to amend the bill.[2] If the amendments make further discovery requisite, the plaintiff may call for a further answer. If the plaintiff

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9. Exceptions to an answer are of two kinds—for insufficiency and for scandal and impertinence. See, generally, as to the practice, 1 Barbour's Ch. Pr., ch. 7, sec. 1, p. 176 *et seq.*

1. See 1 Barbour's Ch. Pr., ch. 7, sec. 2, p. 206 *et seq.*

2. Id.

does not require a further answer, the defendant may nevertheless file one if he considers it material to do so.

The defendant may also under special circumstances obtain leave to amend his answer; but as an answer is put in on oath, the court, for obvious reasons, will not readily suffer alterations to be made.[3] If the defendant cannot obtain permission to file a supplemental answer, he has no other way of correcting his original answer. [347] He cannot do so by filing a cross bill.

The final result of the pleadngs is that **the ultimately amended bill, and the answer or successive answers of the defendant, constitute the whole record.**

If the answer admits the plaintiff's claim, and he is content that it shall be taken as true throughout, the cause may be heard on bill and answer.[4] If he intends to controvert any part of the answer, or requires additional proof of his case, he must join issue with the defendant, in which case he is required to file a replication.[5]

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3. See Smith v. Babcock, 3 Sumner, 583; Jackson v. Cutright, 5 Munf. 308.

4. 2 Daniels' Ch. Pl., ch. 20.

5. A replication now consists of a general denial. Special replications are no longer in use. White v. Morrison, 11 Ill. 361; Duponti v. Mussa, 4 Wash. C. C. 128; Puterburgh's Ch. Pl. & Pr. (4th Ed.) 151; 2 Daniels' Ch. Pl., ch. 20.

CHAPTER V. [348]

OF INTERLOCUTORY ORDERS.

On the filing of a replication, the cause is at issue, and the parties proceed to the proof of their respective cases.

The answer of the defendant is the chief foundation of interlocutory orders, that is, orders not made at the hearing of the cause, but obtained during its progress for incidental objects.

The mode of obtaining interlocutory orders is either by a viva voce application, called a motion, or by a written one called a petition. The statements made in the answer have generally a considerable influence on the application, and in some instances they are the only admissible evidence; where other evidence is admissible, it is brought forward, not by the regular examination of witnesses, but by the **affidavits** [1] of voluntary deponents.

Motions and petitions are divided into two classes,[2] viz.: 1. **Motions and petitions of course,** or such as seek an order which by the practice of the court may be **granted on asking,** without hearing both sides; and 2. **Special motions or petitions,** or those which can **only be granted for cause shown.** Where the application is of the latter kind, it **will not be granted ex parte,** except in cases of emergency, but notice of the motion, or a copy of the petition, must be previously served on all parties interested.[3] [349]

The procedure by petition is also resorted to for a variety of objects not arising in the progress of a suit, but dealt with under the summary jurisdiction by statute. The jurisdiction over solicitors, and in lunacy and bankruptcy, is also exercised by orders on petition.

The objects of interlocutory orders are numerous. The only objects of interlocutory orders, however, which seem

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1. As to affidavits, see 2 Daniels' Ch. Pl., ch. 36; 1 Barbour's Ch. Pr. 597.

2. See, generally, as to the practice upon motions, 1 Barbour's Ch. Pr., Book 3, ch. 1, p. 566 *et seq.*

3. For forms of various petitions, see Puterburgh's Ch. Pl. & Pr., title Petitions.

material to be here noticed are five in number: viz., 1. The production of documents; 2. The payment of money into court; 3. The appointment of a receiver; 4. The grant of an injunction; and 5. A writ of *ne exeat regno*.

I. **The production of documents is ordered for completion of the discovery in the defendant's answer.** [See Discovery.]

II. **Payment of money into court is directed where the defendant admits money to be in his hands which he does not claim as his own, and in which he admits that the applicant, is interested.**[4] [350] The general rule is that this order shall not be made until the answer is put in, and that it must be sustained entirely on the admissions made. [351] If the admissions in the answer do not warrant the application, it may be made at the hearing on the evidence in the cause, or may be made between the original hearing and the hearing on further directions, either on admission in the examination of an acting party, or on the master's report.

The order thus made is strictly one of precaution. The fund is brought into court, that it may be preserved until the decree, and not that an earlier decision of the cause may be made.

The principle on which the order is based is that the fund of which payment into court is asked, **is a fund held by the defendant in trust**; and it therefore does not, as a rule, apply to suits for a mere payment of a debt claimed as due from the defendant to the plaintiff.

III. **A receiver is appointed where an estate or fund is in existence, but there is no competent person entitled to hold it, or the person so entitled is in the nature of a trustee, and is misusing or misapplying the property.**[5] [352] The former of these grounds applies where the owner of personal property is dead, and probate or administration has not been granted, but is *bona fide* litigated in the ecclesiastical courts. The most obvious instance of the second ground of appointment is in the case of **actual trustees**, who

4. See Hosack v. Rogers, 9 Paige, 468.

5. See 1 Barbour's Ch. Pr. 658, *et seq.*

are abusing their trust, and bringing the property into danger. [353] If the legal owner, though not an actual trustee, holds the property subject to clear equities in other parties, but is using it in a manner inconsistent with them, a receiver may be obtained against him. A receiver may be appointed in cases of **partnership**, where one of the partners, having got the business into his hands, is destroying the partnership property, or is claiming to exclude his co-partners from the concern.[6] [354]

The appointment of a receiver, like payment of money into court, may be ordered on affidavit before answer, or even before the defendant has appeared, if any urgent necessity exist. [355] **But the application must generally be made after answer, and must be supported by the admissions of the defendant.**

The appointment, when made, is for the benefit of all parties interested, and not for that of the applicant alone.

IV. **An injunction is granted to restrain a defendant, so long as the litigation continues, from doing acts productive of permanent injury, or from proceeding in an action at law, where an equity is alleged against his legal right.**[7] [See Injunctions.]

As to the interlocutory writ for the protection of the subject-matter until the litigation is decided, the ordinary mode of obtaining this injunction is by moving after notice to the defendant; but in particular cases, where giving notice might accelerate the mischief, it will be granted *ex parte* and without notice; and even where that special ground does not exist, yet if the act to be prohibited is such that delay is productive of serious damage, an *ex parte* injunction may be obtained.

If the injunction be applied for before the answer, it must necessarily be sustained on affidavit; and the defendant may resist it on counter affidavits; or if it has been obtained *ex parte*, he may move to dissolve it on counter

6. See *post*, Partnership.

7. Id., 607 *et seq.* See Injunctions.

affidavits, or may wait until he has filed his answer, and then move to dissolve.

The grant of the interlocutory injunction is discretionary with the court, and depends on the circumstances of each case, and on the degree in which the defendant or the plaintiff, would respectively be prejudiced by the grant or refusal. [357]

The injunction, if granted, is for intermediate protection only, and will be cautiously excluded from any further effect.

As soon as the defendant has put in a full answer, he may move to dissolve the injunction; [359] and it is then a question for the discretion of the court whether, on the facts disclosed by the answer, or, as it is technically termed, on the equity confessed, the injunction shall be at once dissolved, or whether it shall be continued to the hearing. **The general principle of decision is, that if the answer shows the existence of an equitable question, such question shall be preserved intact until the hearing.** But the particular mode of doing this is discretionary with the court.

V. **The writ of ne exeat is a writ to restrain a person from quitting the kingdom without the king's license, or the leave of the court.** [360] It was originally applicable to purposes of state only, but is now extended to private transactions, and **operates in the nature of equitable bail.**[s] It is grantable wherever a present equitable debt is owing, which if due at law would warrant an arrest. The writ is issuable if the defendant is within the jurisdiction, although his domicil may be abroad, but not if the plaintiff be himself resident abroad. In general **it can only be granted after a bill is filed,** and it is usual, though not indispensable, to ask it by the prayer. **It is applied for ex parte by petition or motion;** and the application must be **supported by affidavit,** stating the amount of the debt, and stating that the defendant intends to go abroad, or his threats or declarations to that effect, or facts evincing his

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s. 1 Barbour's Ch. Pr. 647; Mitchell v. Burch, 2 Paige, 606.

intention, and stating also that the debt will be endangered by his so doing.

The writ is directed to the sheriff, and requires him to take security from the defendant in a specified amount that he will not go beyond seas or into Scotland without leave of the court, and in case he refuse to give such security, to commit him to safe custody.[9] [361]

9. See, generally, 1 Barbour's Ch. Pr. 648 *et seq.*

CHAPTER VI. [362]

OF EVIDENCE.

The next regular step after replication is, that the parties should prove their case by evidence. The rules of evidence are the same in equity as at law.[1] Eact litigant must prove by legitimate evidence so many of the facts alleged in his pleadings as are material to the decree asked or resisted, and are not admitted in his suit by his opponent.

The decree asked or resisted, in the sense in which the expression is here used, is not necessarily one for the whole relief sought, but is merely that decree which, according to the practice of the court, can be made in the first instance.

Admissions by an infant, however made, whether by express agreement, or by his bill as plaintiff, or his answer as defendant, or by his omission as plaintiff to reply to an answer, are unavailing, and the facts must be proved by evidence.[2] [363] And admissions by husband and wife cannot bind the wife's inheritance.

As to the admissibility as witnesses of parties to a suit in equity, by the ordinary rules of evidence, until altered by statute, a person interested in the result of a suit was inadmissible as a witness. In equity, however, it often happens that parties are joined as trustees, or otherwise, without possessing or claiming a beneficial interest, or that, even if they have a beneficial interest, it extends only to some of the points at issue. [364] The principle, therefore, which before the alteration of the law established the admissibility of such persons as witnesses was one of frequent operation, and seems to be correctly embodied in the following **rule: that where any person was made a defendant for form's sake, and no decree could be had which he had any beneficial interest in resisting, or where he had by his answer submitted to a decree, and had therefore ceased to have such interest, or where, though having an interest, he**

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1. The general rules of evidence will be considered under the special subject Evidence.

2. See, generally, Ewell's Lead. Cases (1st Ed.), Infancy.

had it in respect of a part only of the matters in issue, he might be examined as a witness either generally or in respect to those matters in which he had no interest.[3]

The manner of taking evidence is different in equity and at law. [365] It is taken at law *viva voce,* and publicly; in equity it is written and secret.[4]

It is required in equity that all witnesses shall be examined before the hearing, and their answers taken down in writing. [366] The witnesses are examined privately by an officer of the court; and it is an imperative rule that until the examination has been completed and the entire depositions given out, which is technically termed passing publication, neither party shall be made acquainted with his adversary's interrogatories, nor with any part of the answers on either side. [367]

The mode of examination is by written interrogatories, which, in the cases of witnesses resident within twenty miles of London, are administered by an officer called the **examiner**; or if they are resident beyond that distance, and the parties are unwilling to incur the expense of bringing them to town, by **commissioners** specially appointed for the purpose. [368]

The interrogatories, as well as the bill and answer, must be signed by counsel, as a security to the court that no irrelevant or improper matter is inserted. They are framed as a series of questions, directed successively to the several facts in issue, and numbered First Interrogatory, Second Interrogatory, and so forth; and a marginal note is usually affixed to each, pointing out the witness for whom it is intended.

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3. By statute in many, if not most, of the United States, the interest of a witness now affects only his credibility, and not his competency, and parties may be examined as witnesses. See the local statutes on the subject.

4. In this country, a great diversity of practice obtains respecting the manner of taking evidence in equity. In some states, the witnesses may be examined in open court *viva voce*, as at law; in others, the testimony is always taken in writing by a master or other duly authorized officer. See 3 Greenl. on Ev., § 267, and the statutes of the respective states. See, also, Chamberlayne on Evidence, and Evidence.

In framing interrogatories, the same rule must be observed as in putting questions to a witness at law: viz., they must not be leading, or suggestive on material points; and they must not be so framed as to embody material facts admitting of an answer by a simple negative or affirmative, and thus presenting to the court the evidence, not as it would be stated by the witness himself, but with the coloring prompted by professional skill and a previous knowledge of the case to be proved.

Before the witnesses are examined, the examining officer is generally instructed as to the interrogatories applying to each witness. [369] **During the actual examination, the examining officer and the witness are the only persons present,** all third persons being strictly excluded.[5] **The witness in then examined on each interrogatory in order,** his answers being taken down on paper, and is not permitted to read, or hear read, any other interrogatory, until that in hand be fully answered. When all the interrogatories have been gone through, the deposition is read over to the witness, who, after correcting any error or omission, signs it. The affixing of his signature completes his examination, and he cannot be again examined on behalf of the same party. [370]

If any of the interrogatories are such as the witness is not bound to answer, — *e. g.,* if they intend to expose him to a penalty or forfeiture, — **he may decline to answer them,** stating at the same time on oath his reasons for so doing. The examiner or commissioner takes down the statement in writing, and the objection is heard and decided by the court. If the witness himself does not object to the question, and its impropriety depends on general grounds, and not on such as are personal to himself, as where the interrogatories are leading, or the depositions scandalous, or where any serious irregularity has occurred in taking them, the court, on motion within a reasonable time, will **suppress the depositions.**

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5. It is believed that this practice prevails in very few, if in any, of the United States. See 1 Barbour's Ch. Pr. 381, and local works on practice.

The witnesses examined in chief by either party may be cross-examined by his opponent; and the interrogatories filed for this purpose, which are termed **Cross Interrogatories**, are in all respects similar to the interrogatories in chief, except that they are not subject to objection on the ground of leading the witness.

The time for publishing the depositions is fixed by the general orders of the court. [371] If either party wishes to delay this step, in order to complete the examination of his witnesses, he must apply to the master to whom the cause stands referred, to enlarge the publication for a further time.

After the depositions have been published and read, no further evidence is admissible without special leave, except evidence to discredit a witness.

After publication has passed, it is the plaintiff's duty to set down the cause for hearing, and to serve a *subpoena* to hear judgment. [373] If he fails to do so in proper time, the defendant may move to dismiss the bill for want of prosecution, or he may set the cause down at his own request, and serve a *subpoena* to hear judgment on the plaintiff. **The plaintiff may at any time before the decree dismiss the bill upon payment of costs**, as a matter of course, without prejudicing his right to file a new bill for the same matter.[6]

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6. See, generally, Chamberlayne on Evidence; 3 Greenl. Ev., part 6, Evidence in Proceedings in Equity.

CHAPTER VII. [374]

OF THE HEARING AND DECREE.

At the hearing of the cause, the pleadings and evidence are stated, and the court makes its decree.[1] If the defendant appears, it is an ordinary decree; if he does not appear at the hearing, it is a **decree by default**; and if he has never appeared in the suit, or if, after appearance, he has neglected to answer, it is a **decree pro confesso. The minutes of the decree** are then prepared by the registrar, and delivered by him to the parties. If it be doubted whether they correctly express the judgment of the court, **they may be discussed** either on a motion to vary them, or by obtaining leave to have the cause spoken to on minutes. **After the minutes have been finally settled, the decree is drawn up, passed, and entered.** The only remaining step is **the enrolment of the decree,** which renders it conclusive in the Court of Chancery, and precludes any subsequent variation in its terms, except by an appeal to the House of Lords.[2]

Decrees are of two kinds, preliminary and final. [375] **The preliminary decree** provides for the investigation of questions which are material either in determining on subsequent steps, or in deciding the issue between the parties; **the final decree,** called the Decree on Further Directions, or on the equity reserved, disposes ultimately of the suit.

The causes which create a necessity for a preliminary decree are four in number, viz.: 1. That in the course of the suit **a dispute** has arisen, **on matter of law, which the court is unwilling to decide;** 2. That **a similar dispute** has arisen **on a matter of fact;** 3. **That the equity claimed is founded on an alleged legal right,** the decision of which the Court of Chancery declines to assume; and 4. That

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1. See, generally, as to the hearing, 1 Barbour's Ch. Pr., Book 1, ch. 11; Puterburgh's Pl. & Pr. (4th Ed.), ch. 13; 2 Daniels' Ch. Pl. (3d Am. Ed.), ch. 24.

2. See, as to decrees, 1 Barbour's Ch. Pr., Book 1, ch. 12; Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 14; 2 Daniels' Ch. Pl. & Pr., ch. 25.

there are **matters to be investigated, which** although within the province of the court, **are such as the presiding judge cannot at the hearing effectually deal with.**

To obviate these impediments, the preliminary decree directs: 1. **A case for a court of law;** 2. **An issue for a jury;** 3. **An action at law,** to be determined in the ordinary course; or 4. **A reference to one of the masters** of the court, to acquire and impart to it the necessary information. Each of these methods of inquiry may be also adopted on interlocutory applications by motion or petition.

1. **A case for the opinion of a court of law is directed where a question of law arises incidentally in a suit.** The direction is not made necessary by any want of jurisdiction. If, however, a doubtful question of law arises which can be effectually separated from the equitable matter, its ordinary practice is to direct, on the application of either party,[3] that a case may be made for the opinion of the common law court, reserving its decision on the consequent equities until after the judges shall have given their certificate. [376] The certificate of the judges is usually adopted by the court, and a decree made in conformity with it. But it is not absolutely binding; and if the judge in equity be still in doubt, he may return the matter for reconsideration to the same or to another court of law; or may, if he think fit, decide in opposition to the certificate.[4]

2. **An issue is directed where an incidental question of fact is so involved in doubt by conflicting or insufficient evidence that the court, considering the inefficacy of written testimony, is desirous of referring it to the verdict of a jury.**[5] It can, however, only be adopted where the evidence creates a doubt, and not as a substitute for omitted evidence.

The form of an issue is that of an action on a wager, assumed to have been made respecting the fact in dispute.

The object of an issue, like that of a case, **is not to bind the court, but to satisfy its conscience.** [377] If, therefore,

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3. Morrice v. Langham, 11 Sim. 280.

4. Lansdowne v. Lansdowne, 2 Bligh. O. S. 86.

5. Morris v. Bernoles, 1 Russ. 301.

the verdict, coupled with the information of the judge's notes, does not afford satisfaction, a new trial will be directed, although there be no surprise or fraud, nor manifest miscarriage, and the verdict be one which at common law would be undisturbed. And even though no new trial is sought, yet when the cause is brought on for further directions, the court, if it thinks that the issue as tried does not answer the purpose intended, may direct a new one to be framed; or may, on reconsideration of the evidence, decide at once against the verdict.[6]

3. **An action at law is directed where the equity is based on a disputed legal right,** but the trial of such right at law is prevented either by equitable impediments which the court is asked to remove, or by the mere pendency of the suit itself: *e. g.*, where an heir at law is unable to bring an ejectment by reason of an outstanding mortgage or term, or where the bill seeks an injunction against the infringement of a disputed patent. [378]

The general rule is that where the foundation of a suit is a legal demand, on which the judgment of a court of law, whether obtained on a verdict or in any other shape, ought to be conclusive, the Court of Chancery will not direct a case or issue, but will either order an action to be brought, providing that the term or other like impediment shall not be set up as a defence at law, or will retain the bill for a limited period, with liberty for the plaintiff to proceed at law. The court will not in general retain the bill unless it thinks that, if the action succeeds, a valid equity will exist; but the retainer is not conclusive on the point, and the decree, on further directions, may be against the plaintiff.

4. **A reference to a master** is an ordinary step in the cause, and comparatively few causes of importance are decided without one or more such references. [378] It is generally made for one of the three following purposes: —

1. **A reference for the protection of absent parties is made where a claim, or the possibility of a claim, to the**

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6. See Lee v. Beatty, 8 Dana. 207. See, generally, note, Adams' Equity (4th Am. Ed.), *376 and cases cited; 3 Greenl. Ev., pt. vi, ch. i, § 261 *et seq.*, §§ 339, 377. Consult the local works on practice and local statutes.

property in suit belongs to creditors or next of kin, or other persons entitled as a class, so that it is uncertain at the hearing whether they are all before the court. In order to remove this uncertainty, a reference is made to the master to ascertain the fact before any step is taken for ascertaining or distributing the fund.

2. **A reference for the working out of details is principally made in matters of account,** when the court declares that the account must be taken, and refers it to the master to investigate the items. So a reference may be made to investigate a vendor's title, to settle conveyances, superintend sales, etc. [380]

3. **Where it becomes necessary to supply defects or failures in evidence.** [382] The circumstances under which the reference would, in regular course, be made, are where the evidence already given has induced a belief in the court that new matter might be elicited by inquiry, or where allegations have been made in the answer, though not established by proof, which, if true, would be material to the cause.

In directing a reference to the master, the court provides for a full investigation of the matter referred, by a direction that the parties shall produce, on oath, all documents in their power, and shall be examined on interrogatories as the master shall direct.

The method in which the master proceeds is by issuing warrants from time to time directing all parties concerned to attend before him at the time and for the purposes therein mentioned. [383] On the proceedings being thus commenced, all the parties who take an active part in the inquiry lay before the master written narratives, called **States of Facts,** of the circumstances on which they respectively rely. The parties then proceed to support them by proof, consisting, first, of the depositions, affidavits, and other evidence already used in the cause; and secondly, of any additional evidence which may be produced in the office,—subject, however, to the restriction that a witness who has been already examined in the cause cannot be re-examined

before the master by the same party without leave of the court.

After the warrant for preparing the report has been issued, no further evidence can be received, but the master will proceed to settle and sign his report on the evidence as it then stands. [384] **At this stage of the proceedings, and whilst the report is still in draft, it is the duty of any dissatisfied party to lay before him written objections,** specifying the point in which he considers it erroneous. **If that be not done, exceptions,** which are the mode of contesting it before the court, **will not be entertained.** The exceptions when taken, though not necessarily identical in words, must in substance agree with the objections. If the objections are allowed by the master, he will alter his draft accordingly; and it will then be the business of the other side to object, as they may be advised.

When the master has disposed of all objections, and come to a conclusion on the matters referred, he settles and signs his report, and such report is then filed.

Subject to the right of making a separate report where any of the inquiries directed by the decree cannot be conveniently delayed till the general report, the rule is that **a master's report must dispose of all matters referred** either by actual findings on each section of the decree, or by pointing out what matters of reference have been waived, and what have been disposed of by separate reports; and the omission of any such matters, or the introduction of any matter not referred to him, will render his report erroneous.

As soon as the master's report has been filed, the next step is its confirmation by the court. In the case of reports under orders made on petition, a petition is the usual mode of objection and confirmation. But with respect to reports under a decree or decretal order, **the regular mode of confirmation is by an order nisi,** made on a motion of course, or petition at the Rolls, and directing that the report shall stand confirmed, "unless the defendant shall, within eight days after notice, show good cause to the contrary." If no cause is shown within the eight days, a further order is made on motion, confirming the report absolutely.

If any of the persons interested, whether actual or quasi parties, are dissatisfied with the report, they may file exceptions after service of the order nisi, and show them as cause against its being made absolute. [386] The exceptions which require the signature of counsel are a written enumeration of the alleged errors, and of the corrections proposed; and they should be so framed as not merely to allege error in general terms, but to enable the court to decide distinctly on each point in dispute. If, however, there be error apparent on the report, as, for example, if the facts stated contradict the conclusion, it is unnecessary to except.

The next step after filing exceptions is that they should be heard and determined by the court; and in doing this there are three courses open for adoption.

1. **They may be disallowed, or allowed absolutely**; which has the effect of at once confirming the report, either as it stands, or with such changes as the allowance of the exceptions may make.

2. **If the facts are imperfectly stated in the report,** or if the existing evidence is unsatisfactory, but it is possible that other evidence exists, which in consequence of a favorable finding has not been adduced; or if the nature of the matter contested, or the frame of the exceptions, is such that their allowance shows a necessity for further investigation, **it may be referred back to the master to review his report,** continuing in the meantime the reservation of further directions, and either allowing the exceptions, or making no order thereon. [387] On a reference back to review, the master may receive additional evidence; but if it be accompanied by an allowance of the exception, he can come to no conclusion inconsistent with the terms of the exception. If no order is made on the exception, his finding on reviewal is unfettered.

3. If the suit has taken such a course that, at the time of hearing the exceptions, it is apparent that whatever order be made, the same decree will follow, **the court may decline to adjudicate on them, and may proceed to decree** on further directions, as if no exceptions had been filed.

The plaintiff may, at his discretion, set down exceptions

for hearing at the same time that he sets down the cause on further directions. But the propriety of so doing will depend on the probability of the exceptions requiring or not requiring a reviewal of the report.[7]

When the exceptions have beendisposed of and the report has been confirmed, the cause is heard on future directions, and this is repeated from time to time as often as any further directions are reserved.

The decree on further directions is confined to carrying out the equities appearing on the report consistently with the original decree. If the original decree is erroneous, the proper mode of correction is by a rehearing or appeal. [388]

A decree thus made, without any reservation of further directions, constitutes a final decree; and after it has been pronounced, the cause is at an end, and no further hearing can be had.[8]

The hearing of the cause on further directions is generally the occasion for deciding on the "**costs of the cause.**" [389] [The subject of costs is largely governed by statute in this country.]

In suits under the protective and administrative juris-

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7. As to the practice in the master's office and before the court on exceptions, the students should consult local works on practice in the state where he resides or in which he expects to practice. The subject is excellently considered in the text, but many modifications will be found to exist in the several states, though the essentials are preserved. See Hoffman's Masters in Chancery; Barbour's Ch. Pr., Book 2, ch. 3, sec. 3, p. 468; Puterburgh's Ch. Pl. & Pr. (4th Ed.) 225-236; 2 Daniels' Ch. Pl. & Pr., ch. 26, sec. 6, 7, where detailed accounts of the various proceedings, with forms, will be found. The 2d volume of Barbour's Chancery Practice is especially valuable for its large collection of forms of various kinds. See, also, Curtis' Equity Precedents, and especially the new equity rules adopted by the United States Supreme Court as well as the court rules in the several states. It should be remembered that in most, if not all, of the states, the courts of last resort have adopted rules of practice which in many respects modify the prior practice. These rules should be found incorporated in the local works on practice.

8. See, as to decrees, 1 Barbour's Ch. Pr., Book 1, ch. 12, pp. 326-373; 2 id. 452 *et seq.* (Precedents); 2 Daniels' Ch. Pl., ch. 25; Puterburgh's Ch. Pl. & Pr. (4th Ed.), 248 *et seq.*; Seton on Decrees.

diction of the court, the general principle is, that the party requiring aid shall be liable for the costs. Such, for instance, are suits for discovery and for perpetuating testimony, in which the costs are paid by the plaintiff.

The amount of costs payable in a suit, whether given out of a fund or payable by a party, is ascertained by taxation, which, if conducted by the strict rule of the court, is termed a taxation **as between "party and party."** [391] But there is in some cases a more liberal allowance, called **"costs as between solicitor and client."**

In suits of a litigious class, the taxation is always "as between party and party;" but in those of a protective or administrative kind, its adoption, though general, is subject to exceptions. The suits in which an exception is made are those for **performance of trusts and administration of assets,** in which the trustee or personal representative has always his costs as between solicitor and client. **In suits to establish or administer a charity,** if the fund be of adequate amount, and the parties have conducted themselves with propriety, the taxation "as between solicitor and client" is extended to the costs of all; and a privilege of a like character is conferred on **the plaintiff in a creditor's suit,** if the estate to be administered prove insolvent.

In suits under the litigious jurisdiction of the court, the general principle is that [subject to a limited discretion exercised by the court] **the costs shall follow the result.**[9] If several claims or defences are set up, of which some only succeed, the costs of suits may be apportioned accordingly, or, instead of such apportionment, each party may be left to the payment of his own. [392]

If a specific **tender** of the amount due be made before the commencement of the suit, or after its commencement, of the amount and costs already incurred, a proof of such tender, and of its refusal by the plaintiff, will throw on

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9. The subject of costs is, in this country, generally regulated by statute and rules of court. No general rules, therefore, can be laid down. Consult local works on practice, the rules of court and local statutes. See note, Adams' Equity (4th Am. Ed.), *389; 2 Daniels' Ch. Pl. & Pr., ch. 30.

him the burden of subsequent costs; and even where no tender can in strictness be made, yet if a defendant has offered terms which would have rendered the suit unnecessary, the plaintiff, though in strictness entitled to a decree, may be refused his costs. [393]

The power of the court for the purpose of compelling obedience to a decree, like that for compelling appearance or answer, was originally confined to process of contempt, already considered. The only differences were, that an attachment for nonperformance of a decree was not, like an attachment on *mesne* process, a bailable writ; that in the particular instance of a decree for delivering up an estate, the court might effectuate its own order by issuing a writ of assistance to the sheriff, commanding him to put the plaintiff in possession; and that on a decree for payment of money, the receipts under a sequestration, though intended as a means of punishment, might indirectly operate as a performance.[1] Where none of these statutory remedies can be adopted, as when the act ordered requires the personal agency of the defendant, the court is remitted to, and can only enforce its decree by, process of contempt.

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1. By statute in England and in this country it is very generally enacted that where the execution of any instrument by the defendant is decreed, the court may direct the master on his default to execute the same in his stead; and that where the decree is for the payment of money, an execution may be issued therefor against the defendant's property in the same manner as upon a judgment at law. Consult the local works on practice and the local statutes and court rules.

CHAPTER VIII. [396]

OF THE REHEARING AND APPEAL.

The authority for the purpose of alteration or reversal of a decree is not confined as at law to the final judgment, but extends to interlocutory proceedings in the cause.

After entry and before enrolment,[1] **a decree in chancery is in some sense still in fieri, and may be altered by a rehearing before the same jurisdiction.**

If the error complained of be a mere clerical slip, it may be rectified before enrolment on a common petition, without the expense of a rehearing. [397] **And if the order itself has been made on motion, or on ex parte petition irregularly presented, it is not the subject of rehearing,** but may be discharged on an independent motion. **In all other cases, a revisal or variation before enrolment must be effected by a petition or rehearing. So long as the decree is capable of rehearing, it is not capable of appeal;** but as soon as enrolment has taken place, it becomes a conclusive decree in chancery, and can only be altered by an appellate jurisdiction. If, therefore, either party desire a rehearing, he should enter a *caveat* against enrolment, which will give him an opportunity to apply for the purpose. But if he neglect this, and the enrolment takes place before an order to rehear has been served, it cannot afterwards be vacated except on special grounds of fraud, surprise, or irregularity.[2]

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1. See 2 Daniels' Ch. Pl. & Pr., ch. 25, sec. 4, as to the manner of enrollment. See, also, 1 Barbour's Ch. Pr. 342-346, as to the method of enrollment in New York prior to the adoption of the Code. The same method, we understand, still prevails in the chancery courts of Michigan.

As a general rule, however, we apprehend that in most of the states enrollment of decrees, other than entering them at length in the book of court records (which is signed by the judge), is not practiced. In Illinois we do not find the word either in the local work on practice or in the Revised Statutes, except with reference to the state militia. The student should, however, not neglect to examine the question in the state where he intends to practice.

2. As to rehearing, see farther 1

The appellate jurisdiction in equity it twofold, viz.: 1. **In the king,** whose conscience is ill administered, and who may issue a special commission *pro re nata* to reconsider his chancellor's decree; and 2. **In the House of Lords,** on petition to them as the supreme judicature of the realm. **The latter of these courses, a petition to the Lords, has now altogether superseded the former.** The jurisdiction is confined to appeals in equity, and does not extend either to the administrative power in lunacy, or to the jurisdictions conferred by statute, unless where such appeal is expressly given, or where the statutory jurisdiction is a mere extension of a previous equity. [399]

There exists a marked distinction in principle between rehearing and appeal in regard to the evidence which may be used on each. **On a rehearing,** which is strictly what its name expresses, a second hearing before the original jurisdiction, **any evidence may be used which might have been used originally,** whether it were in fact so used or not. **But on an appeal,** which is a resort to a superior jurisdiction to determine whether the court below was right, **no evidence can be tendered except that which is entered as read in the decree, or the rejection of which is a ground of appeal.**

The manner of obtaining a rehearing, or of making an appeal, is by petition stating the order or decree complained of, and the subsequent orders, if any have been made, and praying in the one case for a rehearing, in the other for a reversal or variation. In order to warrant a rehearing or appeal, it is sufficient that some litigated question has been decided, and that it is certified by counsel to be fit for reconsideration. [400] But it is essential that the decision be on a litigated point, and, therefore, a decree by consent is excluded.[3]

The effect of a successful rehearing or appeal is obviously

Barbour's Ch. Pr. 352-362; 2 Daniels' Ch. Pl. & Pr. 31. See form of petition for in 2 Barbour's Ch. Pr. 456; 3 Daniels' Pl. & Pr. (3d Am. Ed.) 2172.

3. The manner of praying and perfecting an appeal is usually regulated by statute in this country. See local statutes and works on practice.

to render useless, either wholly or in part, any proceedings under the original decree. [401] It does not, however, follow that they will be saved during its pendency; for it is presumed until reversal that the decree is right; and **if there are special grounds for requiring their stay, a distinct application must be made** to the discretion of the court.

CHAPTER IX. [402]

OF THE CROSS-BILL; BILL OF REVIVOR, AND OF SUPPLEMENT; AND OF THE BILL TO EXECUTE OR TO IMPEACH A DECREE.

Hitherto three things have been assumed, viz.: 1. That a decree on the plaintiff's bill will determine the litigation; 2. That the bill is properly framed at the outset for obtaining that decree; and 3. That the suit is conducted to its termination without interruption or defect.

The first class of imperfection is, where a decree on the plaintiff's bill will not determine the litigation which may arise either from cross relief or discovery being required by the defendants, or from the existence of litigation between co-defendants. In either case it is remedied by one or more cross-bills, filed by one or more of the defendants against the plaintiff, and against such of their co-defendants as the cross-relief may affect. **The proper frame of a cross-bill** is that it should state the original bill and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of cross-litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. [403] But a cross-bill being generally considered as a defence or as a proceeding to procure a complete determination of a matter already in litigation in the court, **the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity** to support the jurisdiction of the court.[1]

The second class of imperfection arises where the bill is framed improperly at the outset. This imperfection ought regularly to be rectified by amendment; but if the time for amendment has elapsed, it may be **rectified by a supplemental bill, or by a bill in the nature of supplement,** the character of which bills will be considered under the head of imperfections of the third class.

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1. Mitf., 80-83; Farquharson v. Seton, 5 Russ. 45; Cartwright v. Clark, 4 Metc. 104. See, generally, as to cross-bills, Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 24; 2 Barbour's Ch. Pr., Book 4, ch. 9.

Imperfections of the third class are those which originate in an interruption or defect subsequent to the institution of the suit, and they are **rectified,** according to circumstances, **by bill of revivor or in the nature of revivor, and by bill of supplement or in the nature of supplement.** They occur where, by reason of some event subsequent to the institution of the suit, there is no person before the court by or against whom it can, either in whole or in part, be prosecuted. They are technically called **abatements,** and are **cured by a bill of revivor, or in the nature of revivor.** The events which cause such abatements are, the **death of any litigant** whose interest or liability does not either determine on death or survive to some other litigant, and the **marriage of a female plaintiff** or co-plaintiff.

The effect of an abatement is that all proceedings in the suit are stayed to the extent of the abated interest; and in order to set them again in motion, the suit must be revived by order or decree, [405] for the purpose of obtaining which **it is requisite that a new bill be filed. If the transmission is by act of law,** viz., to the personal representative or the heir of a deceased party, or to the husband of a married plaintiff, **the bill is termed a bill of revivor;** and unless the defendant shows cause against it by demurrer or plea, within a limited time, an order to revive is made. [406] **If the transmission is by act of the party,** viz., to a devisee, **an original bill in nature of a revivor** must be filed, and a decree made at the hearing to revive the suit.

The liability to abatement, and the consequent right of revivor, are not limited to any particular stage of the suit. The only requisite is, that there be some matter still in litigation, for the decision of which revivor is needed.

If the plaintiff neglect to revive, the defendant's remedy is to move that he may do so within a limited time, or that the bill may be dismissed. [407] It is otherwise after decree; for then all parties are equally entitled to its benefit; and on neglect by the plaintiffs, or those standing in their right, a defendant may revive.

The construction of a bill of revivor is similar in prin-

ciple to that of an original bill.[2] It states the filing of the original bill, and recapitulates so much of its statements as is requisite to show the right to revive. It then states the original prayer of relief, the proceedings which have taken place, and the event which has caused abatement, and prays that the suit may be revived.

In the case of a pure bill of revivor, no answer is requisite, but the revivor is ordered as of course, unless cause be shown by demurrer or plea. If, therefore, the original bill has been answered, the prayer of process is for a *subpoena* to revive, and not to answer; but if the abatement be before answer, it prays an answer to the original bill, and the *subpoena* is framed accordingly.

On an original bill in the nature of a revivor, a decree is the object sought, and the subpoena therefore requires an answer; and if the original bill be unanswered, it asks an answer to that also.

If a suit becomes abated, and the rights of the parties are affected by any event other than that which causes the abatement, *e. g.*, by a settlement, **it is not sufficient to file a mere bill of revivor,** although such a bill might be adequate for merely continuing the suit, so as to enable the parties to prosecute it. [408] **But the parties must incorporate in their bill a supplemental statement of the additional matter;** so that all the facts may be before the court. **The compound bill thus formed is termed a bill of revivor and supplement.** And the rules relating to it, so far as its supplemental character is concerned, are the same with those which will be presently considered under the head of pure supplemental bills.

Defects in a suit subsequent to its institution may be caused, either in respect of parties by the transfer of a former interest, or the rise of a new one, or in respect of issues between the existing parties, by the occurrence of additional facts. And they are cured by **a bill of supplement, or in the nature of supplement.**

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2. See Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 17; 2 Barbour's Ch. Pr. 88 *et seq.*; 2 Daniels' Ch. Pl. & Pr., ch. 31; Story's Equity Pleading, § 354

Where a defect in respect of parties is caused by transfer of an interest already before the court, the transferee may be joined in the suit by supplemental bill; but the necessity of so joining him depends on the character of the transfer. **If the transfer is by act of the party,** *e. g.*, on assignment or mortgage, **the general principle is, that an alienation pendente lite cannot affect the remaining litigants. And therefore, unless the alienation disable the party from performing the decree,** *e. g.*, by conveyance of a legal estate or indorsement of a negotiable security, it **does not render the suit defective,** nor the alienee a necessary party. But the alienee himself, if he claim an interest, may add himself to the cause by supplemental bill, or may present a petition to be heard with the cause. If it is necessary to bring the alienee before the court, the object is effected by a supplemental bill, [409] stating the original bill and proceedings, and the subsequent transfer, and praying to have the same relief against him as was originally asked against his alienor. In all cases, however, such an alienee, acquiring his interest *pendent lite,* is bound by the proceedings in the suit.

If, on the other hand, the transfer be by act of law, as on bankruptcy or insolvency, the rule as to alienation *pendente lite,* does not apply, but **the suit becomes defective** for want of the assignees, and the defect must be remedied by supplemental bill.

When a defect in respect of parties is caused by the rise of a new interest, it cannot be remedied by a supplemental bill, but a bill must be filed in the nature of a supplement, restating the case against the new party, and praying an independent decree. [410] Such new party is not bound by what has taken place, but is entitled to have the entire case proved anew, and an independent decree made.

Where a necessary party has been omitted at the commencement of the suit, but the regular time for amendment has been allowed to pass, **he may** in like manner **be added to the suit by a bill, generally termed supplemental,** but which would, perhaps, be more accurately called original **in the nature of supplement.**

Where a defect in the issue between the existing parties is caused by the occurrence of new matter, it is remedied by a supplemental bill.[3] In order, however, to warrant its introduction, the new matter must be supplemental to the old. If, therefore, it is meant to show a new title in the plaintiff, it is inadmissible. If material facts, which existed when the suit began, are discovered when the time for amendment is passed, they may be introduced by supplemental bill, provided they corroborate the case already made; but if the object of introducing them is to vary that case, so as to produce two inconsistent statements, they are inadmissible by way of supplement, and the plaintiff must obtain special leave to amend. [413]

The frame of a supplemental bill, whether strictly so termed, or one which is original in the nature of supplement, is similar in principle to that of an original bill. [414] It states the filing of the former bill, and recapitulates so much of its statement as is required to show the bearing of the supplemental matter; coupling with such recapitulation, if the bill be original in the nature of supplement, a substantive averment that the statement is correct. It then states the original prayer for relief, the proceedings in the suit, and the supplemental matter; and concludes, if it be not for discovery alone, with the appropriate prayer for relief. All persons must be parties who are interested in the relief sought.

If the bill be not for discovery alone, the cause must be heard on the supplemental matter at the same time that it is heard on the original bill, and a decree must be taken in both suits, or if the cause has been already heard, it must be further heard on the supplemental matter, and a decree taken thereon. [415]

If new matter occurs or is discovered after the decree, it is not properly matter of supplement, but may be introduced into the cause, if necessary, by a bill expressly

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3. See, generally, 2 Barbour's Ch. Pr., Book 4, ch. 2, p. 59; id., ch. 5; Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 15 and 16; 2 Daniels' Ch. Pl. & Pr., ch. 31; Story's Equity Pleading, § 354.

framed for the purpose, and called **a bill to execute or to impeach a decree.**

A bill to execute a decree is a bill assuming as its basis the principle of the decree, and seeking merely to carry it into effect.[4] The distinguishing feature of a bill of this class is, that it must carry out the principle of the former decree. It must take that principle as its basis, and must seek merely to supply omissions in the decree or proceedings, so as to enable the court to give effect to its decision. [416] If it goes beyond this, it is in truth a bill to impeach the decree. It appears, however, that although the plaintiff in such a bill cannot impeach the decree, yet the defendant is not under the same restriction. If the decree can be enforced by the ordinary process, it will be assumed, until reversal, to be correct. And even where a decree is required in aid, the same assumption will be generally made. But it is competent for the court, in respect of the special application, to examine the decree, and if it be unjust, to refuse enforcement.

A bill to impeach a decree is either a bill of review, a supplemental bill in the nature of review, an original bill of the same nature, or an original bill on the ground of fraud.

A bill of review is used to procure the reversal of a decree after signature and enrolment. It may be brought **upon error of law** apparent on the decree, or on occurence **or discovery of new matter.**[5] **In the former case the bill may be filed without leave of the court,** but the error complained of must not be mere error in the decree, as on a mistaken judgment, which would in effect render a bill of review a mere substitute for an appeal, but it must be error apparent on the face of the decree, as in the case of an absolute decree against an infant. Errors, in form only, though apparent on the face of the decree, and mere matters of abatement, seem not to have been considered sufficient ground for review. [417] **Where a bill of review is**

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4. See Story's Equity Pleading, § 429; Mitf., 95.

5. See Story's Equity Pleading, § 404; Puterburgh's Ch. Pl. & Pr., ch. 20.

founded on the occurrence or discovery of new matter, the leave of the court must be first obtained; and this will not be granted except on an affidavit satisfying the court that the new matter could not by reasonable diligence have been produced or used by the applicant at the time when the decree was made; and showing also that such new matter is relevant and material, either as evidence of matter formerly in issue, or as constituting a new issue, and is such as, if previously before the court, might probably have occasioned a different decision.[6] If such a bill is filed without leave, it will be taken off the file or the proceedings stayed.

It is the rule of the court that **the bringing of a bill of review shall not prevent the execution of the decree impeached**, and that a party shall not be allowed, except under very special circumstances, to file or prosecute such a bill, unless he performs at the proper time all that the decree commands. [418]

In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law or the new matter upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact that the new matter has been dicovered since the decree was made. The bill may pray simply that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the further decree of the court to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. The bill may also, if the original suit has become abated, be at the same time a bill of revivor. A supplemental bill may also be added if any event has happened which requires it; and if any person

6. Puterburgh's Ch. Pl. & Pr., ch. 20, sec. 1.

not a party to the original suit becomes interested in the subject, he must be made a party to the bill of review by way of supplement.[7]

A supplemental bill, in the nature of review, is used to procure the reversal of a decree before enrolment, on the occurrence or discovery of new matter. The leave of the court must be obtained for filing it, and the same affidavit is required for this purpose as is necessary to obtain leave for a bill of review.[8] **The manner of procedure** on such a bill is to petition for a rehearing of the cause, and to have it heard at the same time on the new matter introduced. [419] The bill itself in its frame resembles a bill of review, except that instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires.[9] If the ground of complaint be error apparent, it may be corrected on a rehearing alone, and a suplemental bill is unnecessary.

An original bill, in nature of review, is applicable when the interest of the party seeking a reversal was not before the court when the decree was made.[1] A bill of this nature, as it does not seek to alter a decree made against this plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court.[2]

A bill to impeach a decree for fraud used in obtaining it may be filed without the leave of the court, because the alleged fraud is the principal point in issue, and must be established by proof before the propriety of the decree can be investigated. **And where a decree has been so obtained, the court will restore the parties to their former situation,** whatever their rights may be. A bill to set aside a decree for fraud must state the decree and the proceedings which led to it, with the circumstances of fraud on which it is impeached. [420] The prayer must necessarily be varied

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7. Mitf., 88-90.
8. O'Hara v. Shepherd, 2 Md. Ch. 306.
9. Perry v. Phelips, 17 Ves. 178.
1. Kidd v. Cheyne, 18 Jur. 348.
2. Mitf., 92.

according to the nature of the fraud used, and the extent of its operation in obtaining an improper decree.[3]

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3. Mitf., 93, 94.

The student is advised to read the original work of which this is an abridgment. Book IV, which treats of the forms of pleading and procedure in courts of equity, is the best, brief treatment of this subject with which we are acquainted. Barbour's Chancery Practice is an excellent work of its kind. The second volume contains many useful precedents. This work is especially useful in the state of Michigan. Puterburgh's Chancery Pleading & Practice is a valuable work; so is Daniels' Chancery Pleading & Practice. Story's Equity Pleading; Curtis' Equity Precedents; Hoffman's Chancery Practice; Jennisson's Chancery Pleading & Practice; Seton on Decrees, will also be found useful; but above all the student should study the local works on practice and the statutes, rules of court and decisions of his own state.

BEST ON EVIDENCE.

THE LAW OF EVIDENCE.

BEST ON EVIDENCE.

BOOK I.

THE ENGLISH LAW OF EVIDENCE IN GENERAL.

PART I.

GENERAL VIEW OF THE ENGLISH LAW OF EVIDENCE.

The characteristic features of the English common law system of judicial evidence are essentially connected with the constitution of the tribunal by which it is administered, and may be stated as consisting of three great principles. 1. **The admissibility of evidence is matter of law, but the weight or value of evidence is matter of fact.** 2. **Matters of law, including the admissibility of evidence, are proper to be determined by a fixed, matters of fact by a casual tribunal;** but this is a principle which found little favor with the Court of Chancery, and has gradually become a less integral part of the whole English system. 3. **In determining the admissibility of evidence, the production of the best evidence should be exacted.**[1]

The Court of Chancery always decided questions of fact without the assistance of a jury, except where a legal right came into question, when it "directed an issue" to a court

1. These three principles are of universal application wherever the common law system exists unchanged by statute. It is questionable, however, whether the interests of justice would not be better subserved by submitting matters of fact also, at least in all civil cases, to the court instead of to a jury. Such is the practice in the province of Manitoba, Canada, with most excellent results.

of common law. Justices of the peace, too, have been empowered since the time of Edward the Third to convict persons summarily for trivial offences. **But the ordinary common law tribunal for deciding issues of fact consists of a court composed of one or more judges, learned in the law and armed with its authority, assisted by a jury of twelve men, unlearned in the law,** taken indiscriminately from among the people of the county where the venue is laid. In some few instances the trial was, at common law, by the court without a jury; i. e. trial by the record, inspection, certificate, and witnesses.[2] And modern legislation has to a very considerable extent allowed the parties to dispense with a jury.[3]

Where the trial is by jury, jurors may be challenged by the litigant parties for want of the requisite qualifications, as well as for certain causes likely to exercise an undue influence on their decision; in addition to which persons accused of treason or felony are allowed to challenge peremptorily without cause, the former as many as thirty-five, the latter twenty, of the panel.[4] **The court is charged with the general conduct of the proceedings**: it decides all questions of law and practice, including the admission and rejection of evidence; and when the case is ripe for adjudication sums it up to the jury, explaining the questions in dispute, with the law as bearing on them, pointing out on whom the burden of proof lies, and recapitulating the evidence, with such comments and observations as may seem fitting. Moreover, "**Whether there be any evidence, is a question for the judge. Whether sufficient evidence, is for the jury.**"[5]

On the other hand, the decision of the facts in issue is the exclusive province of the jury; who are therefore to hear the evidence and the comments made on it, to determine the credit due to the testimony of the witnesses, and to draw all requisite inferences of fact from the evidence. This division of the functions of the judge and jury is expressed by the maxim, "Ad quaestionem facti non respondent judi-

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2. See Pleading.
3. Consult the local statutes.
4. See vol. 1, Blackstone, Book 4.
5. This proposition is so fundamental and elementary as to need no authority.

ces; ad quaestionem juris non respondent juratores."[6] But this maxim must be taken with these limitations: First. **Facts on which the admissibility of evidence depends are determined by the court,** not by the jury. Thus, whether a sufficient foundation is laid for the reception of secondary evidence, is for the judge; and if the competency of a witness turns on any disputed fact he must decide it. Secondly. **The jury thus far incidentally determine the law, that their verdict is usually general, i. e. guilty or not guilty,** for the plaintiff or for the defendant; such a verdict being manifestly compounded of the facts, and the law as applicable to them. But although the jury have always a right to find a verdict in this form, yet if they feel any doubt about the law, or distrust their own powers of applying it, they may find the facts specially, and leave the court to pronounce judgment according to law on the whole matter.[7]

The rules of evidence are of three kinds: — 1st. **Those which relate to evidence in causa,** i. e. evidence adduced to prove the questions in dispute. 2d. **Those affecting evidence extra causam,** or that which is used only to test the accuracy of media of proof. 3d. **Rules of forensic practice** respecting evidence. **With regard to evidence in causa,**— "the judges and sages of the law have laid it down that **there is but one general rule of evidence, the best that the nature of the case will admit.**" "**The true meaning of the rule** of law that requires the greatest evidence that the nature of the thing is capable of is this: that **no such evidence shall be brought which ex natura rei**[8] **supposes still a greater evidence behind, in the party's own possession and power.**[9]

The true meaning of this fundamental principle will be best understood by considering **the three chief applications of it. Evidence, in order to be receivable, should come**

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6. To a question of fact the judges do not answer; to a question of law the jury does not answer. A less literal translation is, "It is the duty of the judge to instruct the jury on matters of law; of the jury to decide questions of fact." Broom's Leg. Max., *99.

7. See Pleading, Verdict.

8. From the nature of the thing.

9. 1 Chamberlayne on Evidence, §§ 12, 481 *et seq.*

through proper instruments, and be in general original, and proximate. With respect to the first of these, with the exception of a few matters which either the law notices judicially, or which are deemed too notorious to require proof, **the judge and jury must not decide facts on their personal knowledge**; and they should be in a state of legal ignorance of everything relating to the questions in dispute before them, until established by legal evidence, or legitimate inference from it.

The next branch of this rule is that which exacts original and rejects derivative evidence, and prescribes that **no evidence shall be received which shows, on its face, that it only derives its force from some other which is withheld. The terms "primary" and "secondary" evidence** are used by our law in the limited sense of the original and derivative evidence of written documents; **the latter of which is receivable when, by credible testimony, the existence of the primary source has been established and its absence explained.**[1] But derivative evidence of other forms of original evidence is in general rejected absolutely; as where supposed oral evidence is delivered through oral, and the various other sorts of evidence comprised in practice under the very inadequate phrase "hearsay evidence."[2]

The remaining application of this great principle seems based on the maxim, "**In jure non remota causa, sed proxima spectatur.**" It may be stated thus, that, **as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires an open and visible connection between the principal and evidentiary facts, whether they be ultimate or subalternate.** This does not mean a necessary connection, — that would exclude all presumptive evidence, — but such as is reasonable, and not latent or conjectural.

Whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial,[3] or rejected as

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1. See next note, *supra*.

2. See 1 Chamberlayne on Evidence, § 486. For an exhaustive consideration of this subject, consult the title "Hearsay," in the index, vol. 4, Chamberlayne's Evidence. The references are too numerous even to quote.

3. See Chamberlayne on Evidence, § 15.

conjectural evidence, is often a question of extreme difficulty. One test, perhaps, is to consider whether any imaginable number of pieces of evidence, such as that tendered, could be made the ground of decision: for it is the property of a chain of genuine circumstantial evidence, that, however inconclusive each link is in itself, the concurrence of all the links may amount to proof, often of the most convincing kind.

The rules of evidence are in general the same in civil and criminal proceedings; and bind alike crown and subject, prosecutor and accused, plaintiff and defendant, counsel and client. There are, however, some **exceptions.** Thus the doctrine of **estoppel** has a much larger operation in civil proceedings. So an accused person may, at least if undefended by counsel, rest his defence on his own **unsupported statement of facts**, and the jury may weigh the credit due to that statement;[4] whereas, in civil cases, nothing must be opened to the jury which it is not intended to substantiate by proof. Again, **confessions** or other self-disserving statements of prisoners will be rejected if made under the influence of undue promises of favor, or threats of punishment;[5] but there is no such rule respecting similar statements in civil cases. So, although both these branches of the law have each their peculiar presumptions, still the technical rules regulating **the burden of proof** cannot be followed out in all their niceties when they press against accused persons.

But there is a strong and marked difference as to the effect of evidence in **civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The persuasion of guilt ought to amount to a moral certainty**; or, "Such a moral certainty as convinces the minds of the tribunal, as reasonable men, **beyond all reasonable doubt.**"[6]

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4. Consult the local statutes as to evidence or statements by prisoner in his own behalf.

5. This must be voluntary. Voluntary defined, Chamberlayne on Evidence, § 1480 *et seq.*

6. Chamberlayne on Evidence, § 996b, 1016.

Again, the psychological question of **the intent** with which acts are done, plays a much greater part in criminal than in civil proceedings. The maxim, "Actus non facit reum, nisi mens sit rea,"[7] runs through the criminal law, although in some instances a criminal intention is conclusively presumed from certain acts; while in civil actions, to recover damages for misconduct or neglect, it is in general no answer that the defendant did not intend mischief.[8]

And here a question presents itself, **whether and how far the rules of evidence may be relaxed by consent.** In criminal cases, at least in treason and felony, it is the duty of the judge to see that the accused is condemned according to law; and, the rules of evidence forming part of that law, no admissions from him or his counsel will be received. On the other hand, however, much latitude in putting questions and making statemets is given, *de facto* if not *de jure*, to prisoners who are undefended by counsel. So, no consent could procure the admission of evidence which public policy requires to be excluded; such as secrets of state and the like. Moreover, no admission at a trial will dispense with proof of the execution of certain attested instruments, though the instrument itself may be admitted before the trial, with the view to save the trouble and expense of proving it. Subject, however, to these and some other exceptions, the general principles, "Quilibet potest renunciare juri pro se introducto,"—"Omnis consensus tollit errorem,"[9] seem to apply to evidence in civil cases; and much inadmissible evidence is constantly received in practice, because the opposing counsel either deems it not worth while to object, or thinks its reception will be beneficial to his client.[1]

Whether the rules respecting the incompetency of witnesses could be dispensed with by consent seems never to have been settled.[2]

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7. The act itself does not make a man guilty, unless his intention is so. Broom's Leg. Max., *270, 275.

8. See Torts.

9. Any one may renounce a right introduced solely for his own benefit. Every consent removes error. Broom's Leg. Max., *624.

1. The truth of this statement will be manifest on attendance at almost any contested civil case.

2. In practice such incompetency is not unfrequently waived.

Of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given viva voce, in presence of the party against whom they are produced, who is allowed to "**cross-examine**"[3] them, i. e. to ask them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts, and the possibility and probability of the matters narrated.

The other great check is the publicity of our judicial proceedings, — our courts of justice being open to all persons; and in criminal cases the bystanders are even invited by proclamation to come forward with any evidence they may possess affecting the accused. Most of the advantages of secret examination, without its dangers, are attainable by examining the witnesses out of the hearing of each other,— a practice constantly adopted in courts of common law, when combination among them is suspected, or the testimony of one is likely to exercise a dangerous influence over others.

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3. The young practitioner will find a very interesting and profitable book Wellman's Art of Cross-Examination to read in this connection.

PART II.

HISTORY OF THE RISE AND PROGRESS OF THE ENGLISH LAW OF EVIDENCE: WITH ITS ACTUAL STATE AND PROSPECTS.

[The subject matter of Part II., while of great interest, is not of such practical importance as to warrant the space it would here occupy. Lack of space compels the editor to omit everything not really necessary to be known by the student. Consult the text of our author's and Chamberlayne on Evidence.]

BOOK II.

INSTRUMENTS OF EVIDENCE.

By "Instruments of Evidence" are meant the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal. The word "instrument" has, however, both with ourselves and the civilians, a secondary sense, i. e., denoting a particular kind of document. These instruments of evidence are three kinds:—

1. "**Witnesses,**"— persons who inform the tribunal respecting facts.
2. "**Real Evidence,**"— evidence from things.
3. "**Documents,**"— evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols.

PART I.

WITNESSES.

A witness may be defined, a person who gives evidence to a judicial tribunal. This subject may be considered under three heads:—

1. **What persons are compellable to give evidence.**
2. **The incompetency of witnesses;** or who are disqualified from giving evidence.
3. **The grounds of suspicion of testimony.**

CHAPTER I.

WHAT PERSONS ARE COMPELLABLE TO GIVE EVIDENCE.

The law allows no excuse for withholding evidence which is relevant to the matters in question before its tribunals, and is not protected from disclosure by some principle of legal policy. A person, therefore, who, without just cause, absents himself from a trial, at which he has been duly summoned to attend as a witness, or a witness who refuses to give evidence, or to answer questions which the court rules proper to be answered, is liable to punishment for contempt.[1]

No action lies against a witness in respect of his evidence. He is absolutely privileged as to anything he may as a witness do in reference to the cause.[2] **It is a settled rule, however, that a witness is not to be compelled to answer any question, the answering which has a tendency to expose him to a criminal prosecution,**[3] or to proceedings for a penalty, or for a forfeiture even of an estate or interest.

Husbands and wives do not seem to be bound to answer questions tending to criminate each other; but the authorities are somewhat conflicting.[4]

In order to entitle a witness to refuse to answer a question, on the ground that it might tend to criminate him, the question need not be such that the answer thereto would, itself, be evidence against him on a criminal charge; it is sufficient if the answer might furnish a link in a chain of evidence which might implicate him in such a charge.[5]

When the grounds of privilege are before the court, it is for the court, and not for the witness or party interrogated, to decide as to their sufficiency.[6]

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1. See, generally, Chamberlayne on Evidence, title, Contempt.
2. Cooley's Const. Lim. (7th Ed.) 629.
3. Id., 442.
4. See 2 Tr. R. 263; 6 M. & S. 200; 8 Ves. 410; Rex v. Halliday, Bell, 257.
5. Reg. v. Hulme, L. R. 5 Q. B. 384, per Blackburn, J.
6. 1 Den. C. C. 236; 2 Car. & K. 474.

Prior to the passing of the Common Law Procedure Act, 1854, although it was settled that a witness is compellable to answer questions having a tendency to disgrace him, as, for instance, whether he was ever convicted of an offence, if the questions be relevant to the issue in the cause, there was great doubt whether he is also compellable to answer questions relating to collateral matters, and only put in order to test his credit.

These enactments leave the doubt unsolved with regard to questions not named therein, e. g., whether the witness has ever been guilty of a dishonorable act. The better opinion seems to be, that **such questions may be put, and must if the presiding judge require, but not otherwise, be answered.** On this subject three points should be borne in mind: —

1. **The object of the cross-examining party is, in general, sufficiently attained by putting the question**; for the silence of a person, to whom in his hearing a crime or disgraceful act is imputed, is in many instances tantamount to confession.

2. **Cases may arise where the judge, in the exercise of his discretion, would interpose to protect the witness from unnecessary and unbecoimng annoyance**, e. g., in answering questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity.

3. **Where a witness is asked a question which tends to disgrace him, and answers the question, the cross-examiner is in general bound by the answer** so given, because the question goes only to the credit of the witness, which is a collateral matter, and to admit evidence to contradict him would be to raise a question not relevant to the issue.[7]

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7. L. R. 1 C. C. 334; 11 Cox C. C. 410; Rex v. Hodgson, 1 R. & R. 211.

CHAPTER II.

INCOMPETENCY OF WITNESSES.

The distinction between the competency and the credibility of witnesses: A witness is said to be incompetent to give evidence, when the judge is bound as matter of law to reject his testimony, either generally or on some particular subject; in all other cases it is to be received, and its credibility weighed by the jury.

Incompetency in a witness will not be presumed. It comes in the shape of an **exception** or objection to the witness; and if the facts on which it rests are disputed, they must, like all other collateral questions of fact, be determined by the judge;[1] who, in cases of doubt, is always disposed to receive the witness, and let the objection go to his credibility rather than to his competency. In many cases the ground of incompetency is apparent to the senses of the judge; as where a witness presents himself in a state of **intoxication,**[2] or is an obvious **lunatic,**[3] or is of such **tender years** that the judge deems a preliminary inquiry into his religious knowledge essential, and the like.[4] **But the ordinary mode of ascertaining whether a witness is competent is by examining him on what is called the voir dire,** — i. e., a sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him; when, if incompetency appears from his answers, he is rejected, and, even if they are satisfactory, the judge may receive evidence to contradict them, or establish other facts showing the witness to be incompetent.[5]

The only grounds on which the evidence of a witness can with any appearance of reason be rejected, unheard, are

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1. Bartlett v. Smith, 11 M. & W. 483.
2. Mansell v. Reg., 1 Dearsl. & B. 405.
3. 1 Chamberlayne on Evidence, § 202.
4. Id.
5. 10 M. & W. 141; 11 id. 685; 12 A. & E. 442.

reducible to four. 1. **That he has not that degree of intellect** which would enable him to give a rational account of the matters in question. 2. **That he cannot or will not guarantee the truth of his statements by the sanction of an oath,** or what the law deems its equivalent. 3. **That he has been guilty of some crime or misconduct,** showing him to be a person on whose veracity reliance would most probably be misplaced. 4. **That he has a personal interest** in the success or defeat of one of the litigant parties.

In the great case of Omychund (or Omichund) v. Barker (Nilles, 538; 1 Atk. 21),[6] in 1744-45, a commission to examine witnesses in the East Indies having been issued by the Court of Chancery, the commissioners certified that they had examined several persons professing the Gentoo religion, whose evidence was delivered on oath, taken in the usual and most solemn form in which oaths were most usually administered to witnesses who profess that religion, and in the same manner in which oaths were usually administered to such witnesses, in the courts of justice erected by letters patent at Calcutta. On account of its importance, Lord Chancellor Hardwicke was assisted at the hearing of the cause by Lee, C. J., Willes, C. J., and Parker, C. B.; when, on its being proposed to read as evidence the deposition of one of those persons, the defendants' counsel objected that, in order to render a person a competent witness, he must be sworn in the usual way upon the Evangelists, and that the law of England recognized on other form of oath. Each of the judges delivered an able and elaborate judgment; in which they showed clearly that oaths are not peculiar to the Christian religion, having been in constant use, not only in the ancient world, but among men in every age; that the substance of an oath is essentially the same in all cases; namely, an invocation of a Superior Power to attest the veracity of a statement made by a party, acknowledging his readiness to avenge falsehood, and in some cases invoking that vengence; consequently, that the

6. 1 Smith's Lead. Cases, *535. The cases are well collected and considered in the notes.

mode of swearing is not the material part of the oath, and ought to be adjusted to suit the conscience of the witness. They however agreed that infidels, who do not believe in a God or a state of rewards and punishments, cannot be admitted as witnesses; and although from some of the language in that case and in other books it might be supposed that a belief on the part of the witness in a future state of reward and punishment is required, the better opinion is that belief in an avenger of falsehood generally is the only thing needful, the time and place of punishment being mere matter of circumstance.[7]

With respect to the incompetency of witnesses on the ground of interest, the Court of Queen's Bench in Lord Kenyon's time laid down as a clear and certain rule for the future, that, in order to render a witness incompetent on that ground, it must appear either that he was directly interested in the event of the suit; or that he could avail himself of the verdict in the cause, so as to give it in evidence on some future occasion in support of his own claim.[8]

There is another ground of incompetency which has been altogether abolished by statute in England, namely, infamy of character. "Repellitur a sacramento infamis"[9] was the rule of law; and in determining what offences should be deemed infamous an artificial distinction was taken, which caused the whole system to work very unevenly. We allude to the distinction between the *infamia juris* and the *infamia facti*,— between the infamy of an offence viewed in itself, and that arbitrarily attributed to it by law, — it being a principle that some offences, although *minoris culpae*,[1] were *majoris infamiae*.[2] Treason and felony stood at the head. A conviction for misdemeanor did not in gen-

7. The present tendency of legislation is to abolish all these disqualifications entirely. Many states have constitutional provisions in the subject. See Cooley's Const. Lim. (7th Ed.) 676, 677 and notes.

8. Objections to the competency of witnesses on the ground of interest have been very generally removed in this country, the fact of interest going only to the credibility, and not the competency, of the witness. Consult the statutes.

9. An infamous person is denied an oath.

1. Of minor fault.

2. Of greater infamy.

eral render a witness incompetent; but to this there was the general exception of offences coming under the description of the **crimen falsi**, — such as **forgery, perjury, subornation of perjury, various forms of conspiracy**, and the like.

In all cases **the incompetency was created**, not by the conviction, but **by the judgment** of the court pronounced against the offender. Incompetency on the ground of infamy was removable of course by reversal of the judgment, and, in general, by pardon, by having undergone the punishment awarded for the offence.[3]

I. **Incompetency from want of reason and understanding.** The causes of this incompetency are twofold; — **Deficiency of intellect, and Immaturity of intellect.** The objection on the first of these grounds rarely presents itself to the competency of a witness; and if the defect appears in the course of his examination, it is usually made matter of comment to the jury.

Our books lay down generally that **persons of "non-sane memory," and who have not the use of reason, are excluded from giving evidence.**

Who are thus excluded? According to Lord Coke, "**Non compos mentis is of four sorts.** 1. **An idiot**, which from his nativity, by a perpetual infirmity, is *non compos mentis*. 2. **He that by sickness, grief, or other accident, wholly loses his memory** and understanding. 3. **A lunatic** that hath sometime his understanding and sometime not, and therefore he is called *non compos mentis* so long as he hath not understanding. 4. Lastly, **he that by his own vicious act for a time depriveth himself of his memory and understanding**, as he that is drunken." A similar classification is adopted in modern works on evidence. **These four sorts of persons are incompetent witnesses, until the cause of incompetency is removed. A lunatic while in a lucid interval is a competent witness**; likewise the evidence of a mono-

3. See, generally, Co. Litt., 158a; id., 6b; Willes, 667; Phl. & Am. Ev., 14, 17.

maniac, i. e., a person insane on only one subject, can be received on matters not connected with his delusion.

In such cases the judge must determine the competency, and the jury the credibility. Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circumstances which might show him to be inadmissible; but, in the absence of such proof, he is *prima facie* admissible, and the jury must attach what weight they think fit to his testimony.[4]

As to the degree of mental alienation which disqualifies from giving evidence, **if mental alienation is to be retained in our law as a ground of incompetency, it should be restricted to cases where it is found impossible to communicate with the witness, so as to make him understand that he is in a court of justice and expected to speak the truth.**[4a] And eccentricities or aberrations which fall short of this are surely only matter of comment to the jury, as to the reliance to be placed on the testimony.

With respect to the evidence of children the rule is now settled that **an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath**; for there is no precise or fixed rule, as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received.[5]

II. "**Incompetency from want of religion.**" **An oath** is a recognition by the speaker of the presence of an invisible Being superior to man, ready and willing to punish any deviation from truth, invoking that Being to attest the truth of what is uttered, and in some cases calling down his vengence in the event of falsehood. Courts of justice in

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4. See, generally, Chamberlayne on Evidence, § 202; Chamberlayne's Best's Evidence, 131.

4a. Id.

5. Id.

most nations exact an oath as a condition precedent to the reception of evidence; and among us, in particular, "**In judicio non creditur nisi juratis**"[6] has been a legal maxim from the earlest time. **By the common law, the evidence of a witness must be rejected who either was ignorant, or who denied the existence, of such a superior power, or refused to give the required security to the truth of his testimony**; and the present source of incompetency may accordingly be considered under three heads: 1st. **Want of religious knowledge**; 2d. **Want of religious belief**; and 3d. **Refusal to comply with religious forms.**

The first of these may be disposed of in a word; the exception arising principally in the case of **children**, whose competency has already been considered. But the same principles apply where **an adult** deficient in the requisite religious knowledge is offered as a witness.

2d. **In competency for want of religious belief.** This has been in a great degree anticipated in a former part of this chapter.[7] **Every person ought to be admitted to give evidence who believes in a Divine Being, the avenger of falsehood and perjury among men, and who consents to invoke by some binding ceremony the attestation of that Power to the truth of his deposition.**

Disbelief in the existence and moral government of God is not to be presumed. If such disbelief exist, this is a psychological fact, and is consequently incapable of proof except by the avowal of the party himself, or the presumption arising from circumstances. According to most of our text writers and the usual practice, the proper and regular mode of procedure is **by examining the party himself**, while some authorities go so far as to assert that this is the only mode. **No question can be asked beyond whether he believes in a God, the avenger of falsehood, and will designate a mode of swearing binding on his conscience**; and if he complies with these, he cannot be asked whether he considers any other mode more binding, for such a question is unnecessary and irrelevant.

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6. In judgment one is not to be believed unless sworn. Cro. Car., 64.

7. See *ante*, and note.

The ordinary form of swearing in English courts of common law is well known. The witness, holding the New Testament in his bare right hand, is addressed by the officer of the court in a form which varies according to the nature of the proceedings.

In criminal cases, when the accused is in custody, it runs thus: —

"The evidence that you shall give to the court and jury, sworn between our sovereign lady the Queen and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth: So help you God."

When the accused is not in custody, the form is the same, except that he is then described as "the defendant."

In civil cases it is: —

"The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth: So help you God."

The witness then kisses the book.[8]

But if a witness allows himself to be sworn in either of these forms, or in any other form, without objecting, he is liable to be indicted for perjury if his testimony prove false.

Witnesses are to be sworn in that form which they consider binding on their consciences. Members of the Kirk of Scotland, and others, who object to kissing or touching the book, have been sworn by lifting up the hand while it lay open before them. In Ireland, Roman Catholics are (or at least were) sworn on a New Testament with a cross delineated on the cover. Jews are sworn on the Pentateuch, keeping on their hats, the language of the oath being changed from "So help you God," to "So help you Jehovah." Mohammedans are sworn on the Koran.[9]

Atheism, and other forms of infidelity which deny all exercise of divine power in rewarding truth and punishing

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8. Substantially the same forms are observed in this country except that kissing the book is often dispensed with. The statutes generally allow one objecting to an oath to affirm under the pains and penalties of perjury. Consult the local statutes.

9. See Omichund v. Barker, *ante*, note and text.

falsehood, continue to be recognized as grounds of incompetency. But it may be gravely questioned whether this state of the law ought to be maintained, and whether it is not more properly an objection to the credit than to the competency of the witness. The common law rules upon this subject have been changed by legislation in England and some of the United States of America, whereby the want of religious belief is treated as an objection to the credit, not to the competency, of a witness.[1]

3d. **The refusal by the person called as a witness to comply with religious forms.** A perverse refusal to be sworn was treated as a **contempt** of court; but great difficulty had arisen in modern times, from the circumstance that several sects of Christians, and individual members of other sects, entertained conscientious objections to the use of oaths. The legislature [both in England and the United States], where these scruples are *bona fide,* has substituted for an oath **a solemn affirmation** or declaration, rendering, however, a false affirmation or declaration punishable as perjury.

III. **Incompetency from interest.** [By statute now, both in England and the United States, objections to a witness on the ground of interest extend no longer to competency, but only affect the credibility of the witness.]

A striking exception to the common law rule, which excluded the evidence of parties interested in the event of a suit, or question at issue, is to be found in the old system of allowing persons indicted for treason or felony to become *approvers,* which has been replaced by the modern practice of receiving **the evidence of accomplices.**

Although in strictness a jury may legally (except where two witnesses are required by law) convict on the unsupported evidence of an accomplice or *socius criminis;* yet it is a rule of general and **usual practice** — now so generally followed as almost to have the force of law — **for the judge to advise the jury not to convict on the evidence of an accomplice alone.**[2] It is not necessary, however, that the story

1. See *ante,* note.

2. Rex v. Boyes, 1 B. & S. 320, per Wightman, J.; Chamberlayne's Best's Evidence, 157, 569, note.

told by the accomplice should be corroborated in every circumstance he details in evidence. Again, it seems now settled that the corroboration should not be merely as to the *corpus delicti*,[3] but should go to some circumstances affecting the identity of the accused as participating in the transaction. It is thought that confirmatory evidence by the wife of an accomplice will not suffice, for they must for this purpose be considered as one person. Neither ought the jury to be satisfied merely with the evidence of several accomplices who corroborate each other.

The other persons affected by this rule of exclusion were **the husbands and wives of the parties to the suit** or proceeding.[4] It was a general rule of the common law that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband. This rule was not limited to protecting from disclosure matters communicated in nuptial confidence, or facts the knowledge of which had been acquired in consequence of the relation of husband and wife; but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired. But the rule only applied where the husband or wife was party to the suit or proceeding, in which the other was called as a witness, and **did not extend to collateral proceedings between third parties.** The declarations of a wife, acting as the lawful constituted **agent of her husband**, were admissible against him, like the declarations of any other lawfully constituted agent.

The common law made an **exception** to this rule, **where one of the married parties used or threatened personal violence to the other.** Thus, on an indictment against a man for assault and battery of his wife, or *vice versa*, the injured party is a competent witness; and husband and wife may swear the peace against each other.[5]

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3. The body of the offense.

4. In this country this rule has been to a greater or less degree changed by statute. Consult the local statutes.

5. Chamberlayne's Best's Evidence, 160.

The case of bigamy presents some difficulty. **The first wife, or husband, as the case may be, is not a competent witness against the accused**; but the second wife or husband is, after proof of the first marriage, for then the second marriage is a nullity.[6]

What is the rule on this subject in cases of **high treason** is a disputed point. Many eminent authorities lay down, that in such cases the testimony of married persons is receivable against each other. There is, however, high authority the other way; and most of the modern text writers seem disposed to consider the evidence not receivable.[7]

Before dismissing the subject of the incompetency of witnesses, it will be necessary to advert to certain persons who, in consequence of their peculiar position or functions, may seem incompetent to give evidence. And foremost among these stands **the Sovereign.** It has been made a question whether he can be examined as a witness in our courts of justice, and, if so, whether the examination must be on oath in the usual way. Conceding, of course, that no compulsory process could be used to obtain the evidence, it seems that both questions ought to be answered in the affirmative.[8]

The other persons to whom we have alluded, as apparently incompetent to give evidence, are the **counsel and solicitors engaged in a cause, and the judges and jurymen by whom it is tried.** It is settled law, and every day's practice, that **a solicitor is a competent witness** either for or against his client; although neither solicitor nor counsel will be permitted, without the consent of the client, to disclose matters communicated to him in professional confidence. But whether the **counsel** in a cause are competent witnesses, was formerly a disputed question. **There can be no doubt that to call an advocate in the cause as a witness is most objectionable, and should be avoided whenever possible.** But we apprehend that **a judge has no right in**

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6. Roscoe's Cr. Ev. (4th Ed.) 142; Chamberlayne's Best's Evidence, 161.

7. 1 Greenl. Ev. (7th Ed.), § 345; Taylor's Ev. (5th Ed.), § 1237; Chamberlayne's Best's Evidence, 162.

8. Taylor's Ev. (5th Ed.), § 1246; Chamberlayne's Best's Evidence, 166.

point of law to reject him; although, if the court above were of opinion that, under all the circumstances, any practical mischief had resulted from the reception of such a witness, they might, in their discretion, grant a new trial, if not as matter of right, at least as matter of judgment.[9]

A juryman may be a witness for either of the parties to a cause which he is trying. But here an important distinction must be borne in mind, viz.: the difference between general information, and particular personal knowledge. "A juror cannot give a verdict founded on his own private knowledge. . . . If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts, it will be a ground of motion for a new trial."[1]

Lastly, with respect to **judges. It is no objection to the competency of a witness, that he is named as a judge in the commission under which the court is sitting.** But a distinction has been taken with respect to the judge who is actually trying the cause. Sir John Hawles says (11 How. St. Tr. 459): "Every man knows that a judge in a civil matter tried before him has been enforced to give evidence, for in that particular a judge ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after reassume his authority, and is afterwards a judge of the jury's verdict." There can be no doubt, however, that if a judge gives evidence he must be sworn, and be examined and cross-examined like any other witness.[2]

An arbitrator may he called as a witness in an action to enforce his award, and may be asked what passed before him, and what matters were presented to him for consideration, but not what passed in his own mind when exercising his discretionary powers as to the matters submitted to him.

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9. Chamberlayne's Best's Evidence, 168. While attorneys and counsel are not incompetent as witnesses, still as a matter of ethics they should retire from the cause before being sworn.

1. Howser v. Com., 51 Pa. St. 332; State v. Powell, 2 Halst. (N. J.) 244; Schmidt v. Ins. Co., 1 Gray, 535.

2. See 2 Hawk. P. C., c. 46s, 17; 1 Greenl. Ev., §§ 166, 249, 364; Chamberlayne's Best's Evidence, 175.

CHAPTER III.

GROUNDS OF SUSPICION OF TESTIMONY.

"**Exceptions to the credit of the witness,**" says Sir Matthew Hale, "do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility, of the witness and his testimony; and these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances."[1]

Pecuniary interest was formerly a ground of incompetency; and in order to estimate its weight, the condition and circumstances in life of the witness should, if practicable, be ascertained and taken into consideration.

A powerful source of false testimony is to be found in **the relations between the sexes.** Previous to the 16 & 17 Vict., c. 83, husband and wife were incompetent witnesses for or against each other in most civil, as they still are in most criminal cases.[2] But the existence of any other relation of this kind — such as that of a man with his kept mistress, etc.— only goes to the credit of a witness.[3]

The interest arising out of other domestic and social relations may have its source either in affection, desire of revenge, or a dread of oppression or vexation. In the laws of some countries, blood relationship within certain degrees has been made a ground of incompetency; and friendship or enmity with one of the litigant parties may justly cause evidence to be looked on with suspicion. Among us, however, this only goes to the credit of the witness.[4]

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1. They have been immensely increased in consequence of the statutes respecting interest of witnesses in the event of the cause. The tendency now is to make all objections go to the credibility rather than the competency of witnesses.

2. Consult the local statutes.

3. See Chamberlayne's Best's Evidence, 180.

4. Id., 180.

Perjury is often committed to preserve the reputation of the swearer. An example of this may be seen in those cases, and they are of frequent occurrence, where the person called as a witness has, on some former occasion, given a certain account of the transaction about which he is interrogated, and is afraid or ashamed to retract that account.[5]

The last source of bias which we shall notice is the feeling of **interest in or affection for others.** A man who belongs to a body, or is a member of a secret society, governed by principles unknown to the rest of mankind, comes before the tribunal loaded with the passions of others in addition to his own. To this head belong those cases where mendacious evidence is given through the sympathy generated by a similarity of station in life, or a coincidence of social, political, or religious opinions, and the like.[6]

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5. Id., 181.

6 Id., 181.

PART II.

REAL EVIDENCE.

"**Real Evidence**" — the *evidentia rei vel facti* of the civilians — **means all evidence of which any oject belonging to the class of things is the source**; persons also being included, in respect of such properties as belong to them in common with things.[1] Thus, formerly, on an appeal of mayhem, the court would in some cases inspect the wound, in order to see whether it were a mayhem or not.

Real evidence is either immediate or reported. Immedite real evidence is where the thing which is the source of the evidence is present to the senses of the tribunal. This is of all proof the most satisfactory and convincing; but it is rarely available, at least with respect to principal facts.[2]

In some cases the production of certain species of real evidence is peremptorily exacted, to the exclusion of all substitutes. Thus, it is an established rule that a prisoner shall not be convicted of murder, "unless the fact were proved to be done, or at least the body be found dead."[3] **But real evidence is often produced at trials, when it is not exacted** by any rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models, or by what is technically termed a "view," i. e., a personal inspection by some of the jury of the *locus in quo,* — a proceeding allowed in certain cases by the common law, in criminal as well as in civil cases.

Reported real evidence is where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents. This sort of proof

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1. See Chamberlayne's Best's Evidence, 196, note.

2. See 1 Chamberlayne's Evidence, §§ 27-31 and authorities cited; Chamberlayne's Best's Evidence, 184, 196, note.

3. 2 Chamberlayne on Evidence, § 1631.

is, from its very nature, less satisfactory and convincing than immediate real evidence.[4]

Circumstantial real evidence partakes of the nature of all other circumstantial evidence in this, that the persuasions or inferences to which it gives rise are sometimes *necessary* and sometimes only *presumptive*. And as it is in criminal proceedings that the value and dangers of this mode of proof are chiefly conspicuous, we shall devote the rest of this chapter to a consideration of its probative force and infirmative hypotheses in those proceedings. By "**infirmative fact**" or "**hypothesis**" is meant any fact or hypothesis which, while insufficient in itself either to disprove or render improbable the existence of a principal fact, yet tends to weaken or render infirm the probative force of some other fact which is evidentiary of it.

In the case of necessary inferences, properly so called, there can be no infirmative facts or hypotheses. As instances, where a female was found dead in a room, with every sign of having met a violent end, the presence of another person at the scene of action was demonstrated by the bloody mark of a left hand visible on her left arm.[5]

Cases of this kind are, however, of rare occurrence, and when they do present themselves, the facts speak too plainly to need comment. **In the vast majority of instances, the inference to which a piece of circumstantial real evidence gives rise is only probable or presumptive.** On charge of homicide, for instance, the nature of the weapon with which the fatal blow was given is of the utmost importance in determining whether malice existed or ought to be presumed. But **physicial coincidences and dissimilarities**, often of a most singular kind, frequently lead to the discovery of the perpetrators of offences, or establish the innocence of parties wrongly accused. Several instances of the former are given by Starkie.[6] Thus, in a case of burglary,

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4. See authorities in next note, *supra*.

5. 10 Harg. St. Tri. App. No. 2, p. 29. See, also, Wills' Circ. Ev. (3d Ed.) 80.

6. 1 Stark. Ev. (3d Ed.) 562; id. (4th Ed.) 844; Chamberlayne's Best's Evidence, 186.

— where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt, — part of the blade was left sticking in the window-frame, and a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner.

Strong, however, as coinsidences and dissimilarities of this nature undoubtedly are, we must be careful not to attribute to them, when standing alone, a conclusive effect in all cases. It should be remembered that the man who was found in possession of the broken knife might have picked it up where it had been thrown by the real criminal.[7]

It is when taken in connection with other evidence that physical coincidences and dissimilarities are chiefly valuable; and then they certainly press with fearful weight on a criminal. But if their presence is powerful for conviction, their absence is at least equally powerful for exculpation.[8]

The infirmative hypotheses affecting real evidence. Considered in the abstract, real evidence, apparently indicative of guilt, may be indebted for its criminative shape to accident, forgery, or the lawful action of the accused. Here it must not be forgotten that sometimes the most innocent men cannot explain or give any account whatever of facts which seem to criminate them; and the experience of almost every person will supply him with instances of extraordinary occurrences, the cause of which is, to him at least, completely wrapped in mystery.

I. **Accident.** The appearance of blood on the clothes of an accused or suspected person may be explained by his having, in the dark, come in contact with a bleeding body. Under this head come those cases where the appearance is the result of irresponsible agency; as where the act has been done by a party in a state of somnambulism.[9]

II. **The forgery of real evidence** is in some degree analogous to the subornation of personal evidence, being an attempt to pervert and corrupt the nature of things or real objects, and thus force them to speak falsely.

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7. Id.
8. 1 Hale P. C. 635, 636.
9. See note to Chamberlayne's Best's Evidence, 188.

Forgery of real evidence may have its origin in any of the following causes: 1. **Self-exculpation.** 2. **The malicious intention** of injuring the accused, or others. 3. **Sport,** or with the view of effecting some moral end.

1. **Self-exculpative forgery of real evidence.** An excellent instance of the danger to be apprehended from this source is given by Sir Matthew Hale. After observing that the recent and unexplained possession of stolen property raises a strong presumption of larceny, he tells us of a case tried, as he says, before a very learned and wary judge, where a man was condemned and executed for horse-stealing, on the strength of his having been found upon the animal the day it was stolen, but whose innocence was afterwards made clear by the confession of the real thief; who acknowledged that, on finding himself closely pursued, he had requested the unfortunate man to walk his horse for him while he turned aside upon a necessary occasion, and thus escaped.[1] This species of forgery, however, is not confined to criminals. It sometimes happens that an innocent man, sensible that, though guiltless, appearances are against him, and not duly weighing the danger of being detected in clandestine attempts to stifle proof, endeavors to get rid of real evidence in such a way as to avert suspicion from himself, or even to turn it on some one else.

2. **The forgery of real evidence may have been effected with the malicious purpose of bringing down suffering on an innocent individual.** The most obvious instance is where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with the view of exciting a suspicion of larceny against him; and a suspicion of murder may be raised by secreting a bloody weapon in the like manner.[2]

It sometimes happens that real evidence is forged, with the double motive of self-exculpation and of inducing suspicion on a hated individual. And, lastly, it is to be observed, that this species of forgery may be accomplished

1. See 2 Chamberlayne's Evidence, §§ 1133 *et seq.* and notes, where the cases are fully collected.

2. See next note, *supra.*

by force as well as by fraud; e. g., three men unite in a conspiracy against an innocent person; one lays hold of his hands, another puts into his pocket an article of stolen property, which the third, running up as if by accident during the scuffle, finds there, and denounces him to justice as a thief.[3]

3. **Forgery of real evidence committed either in sport** or with the view of effecting some moral end. As an instance of this may be cited the story of the patriarch Joseph, who, with a view of creating alarm and remorse in the minds of his guilty brothers for their conduct towards him in early life, caused a silver cup to be privately hid in one of their sacks, and, after they had gone some distance on their journey, had them arrested and brought back as thieves.[4]

III. **The apparently criminative fact may have been created by the accused, in the furtherance of some lawful, or even laudable design.** This is best exemplified by those cases of larceny where stolen property is found in the possession of a person who, knowing or suspecting it to have been stolen, takes possession of it with the view of seeking the true owner in order to restore it, or of bringing the thief to justice; but, before this can be accomplished, becomes himself the object of suspicion, in consequence of the stolen property being seen in his possession, or of false information being laid against him.[5]

Real evidence, while truly evidentiary of guilt in general, **may be fallacious as to the quality of the crime.** The recent possession of stolen property, for instance, standing alone, is, deemed presumptive evidence of larceny, not of the accused having received the goods with a guilty knowledge of their having been stolen. And there can be little doubt that many persons have been convicted and punished for the former offence whose guilt consisted in the latter.[6]

Possession by the accused of the whole or some portion of stolen property is not only presumptive evidence of de-

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3. See note, *supra;* also Chamberlayne's Best's Evidence, 189 and notes.

4. Genesis, xliv, 2 *et seq.*

5. Chamberlayne's Best's Evidence, 191 and note.

linquency when coupled with other circumstances; but, even when standing alone, it will in many cases raise a presumption of guilt, sufficient to cast on the accused the onus of showing that he came honestly by the stolen property; and in default of his so doing, it will warrant the jury in convicting him as the thief. In order, however, to put the accused on his defence, **his possession of the stolen property must be recent**; although what shall be deemed recent possession must be determined by the nature of the articles stolen.[7]

The probability of guilt is increased by the coincidence in number of the articles stolen with those found in the possession of the accused, — the possession of one out of a large number stolen being more easily attributable to accident or forgery than the possession of all.[8]

But in order to raise this presumption legitimately, the possession of the stolen property should be exclusive, as well as recent.[9] If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defence; but if they were found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt.

There can be no doubt that, in practice the legitimate limits of the presumption under consideration are sometimes overstepped. It is in its character of a circumstance joined with others of a criminative nature, that the fact of possession becomes really valuable and entitled to consideration, whether it be ancient or recent, joint or exclusive.

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6. See authorities cited in the preceding notes.

7. 2 Chamberlayne's Evidence, §§ 1133 *et seq.* and cases cited.

8. Id.,

9. Id.

PART III.

DOCUMENTS.

CHAPTER I.

DOCUMENTARY EVIDENCE IN GENERAL.

The term Documents properly includes all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus, the wooden scores on which bakers, milkmen, etc., indicate by notches the number of loaves of bread or quarts of milk supplied to their customers, the old exchequer tallies, and such like, are documents as much as the most elaborate deeds.[1]

Documents, being inanimate things, necessarily come to the cognizance of tribunals through the medium of human testimony.

When documents which are wanted for evidence are in the possession of the opposite party, a notice to produce them should be served on him in due time before the trial; when, if he fails to produce them, derivative, or, as it is technically termed, "secondary" evidence, of their contents may be given. When they are in the possession of a third party, he should be served with what is called a **subpoena duces tecum,** i. e. a summons to attend the trial as a witness and bring the documents with him.[2]

Although documentary evidence most usually presents itself in a written form, the terms "writing" and "written evidence" have obtained in law, a secondary and limited signification, in which they are commonly, but not always used.

"Writings" are of two kinds, "public" and "private."

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1. See Chamberlayne's Best's Evidence, 198, 199 and note.

2. Id., 199. This is the universal practice.

Under the former come acts of Parliament, judgments, and acts of courts, both of voluntary and contentious jurisdiction, proclamations, public books, and the like. They are divided into "judicial" and "not judicial"; and also into "writings of record" and "writings not of record." **Records are the memorials of the legislature, and of the King's courts of justice, and are authentic beyond all manner of contradiction.**[3] But the judgments of tribunals are not in general receivable in evidence against those who were neither party nor privy to them; although in some instances the law; from motives of policy, renders them conclusive and binding on all the world, as in the case of judgments *in rem*.[4]

"**Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining** the parties on whose authority the truth of the document depends." This must not be understood to mean that the contents of public writings are admissible in evidence for every purpose: each public document is only receivable in proof of those matters the remembrance of which it was called into existence to perpetuate.[5] Some public writings are like records, — conclusive on all the world: but this is not their general character; as, most usually, they only hold good until disproved.

Among private writings, the first and most important are those which come under the description of "**deeds,**" i. e. "**writings sealed and delivered.**" And they differ from inferior written instruments in this important particular, namely, that **they are presumed to have been made on good consideration**; and this presumption cannot be rebutted, unless the instrument is impeached for fraud; whereas in contracts not under seal a consideration must be alleged and proved.[6] In former ages deeds were rarely signed, and

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3. Co. Litt., 260a; Gilb. Ev. (4th Ed.) 7; Chamberlayne's Best's Evidence 201.

4. 1 Chamberlayne's Best's Evidence, Book 3, pt. 2, ch. 9.

5. As to the completeness of the record required, see 1 Chaberlayne on Evidence, § 509 *et seq.* and notes.

6. See *ante*, Contracts, Deeds; also, vol. 1, Deeds.

the essence of that kind of instrument consisted, and indeed consists still, in the sealing and delivery.[7]

Deeds are usually attested by witnesses; who subscribe their names, to signify that the deed has been executed in their presence. In modern practice the rule is that the execution of a deed must be proved by the testimony of at least one of the attesting witnesses. If they are all dead, or insane, or out of the jurisdiction of the court, or cannot be found on diligent inquiry, proof may be given of their handwriting; but the testimony of third parties, even though they might have been present at the execution of the instrument, is not receivable to prove it. They may, however, be received to contradict the testimony of the subscribing witnesses.[8] But it was not necessary to call the attesting witness, or indeed to give any proof of **a deed thirty years old or upwards, and coming from an unsuspected repository**; unless perhaps when there was an erasure or other blemish in some material part of it.[9]

Instruments not under seal are sometimes attested by witnesses; and in such cases it is held that the attesting witness must be called, or his handwriting proved, as in the case of a deed.[1]

Where there is no attesting witness the usual proof is by the handwriting of the party. (Part III. ch. 2.)

Wills. By the Statute of Frauds, 29 Car. II., c. 3, s. 5, it was enacted that all devises and bequests of lands or tenements, to be valid, should be in writing and signed by the party, or by some other person in his presence and by his express directions, and be attested and subscribed in his presence by at least three credible witnesses.[2] Wills of personalty remained as at the common law, and did not require any witness.[3]

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7. Id.

8. See vol. 1 (Blackstone), Deeds. The rule requiring the calling of the attesting witness sometimes occasions embarrassment. If the instrument is *executed in the presence of witnesses who do not sign as such*, other witnesses are competent to prove the execution and such embarrassment is often prevented.

9. 2 Chamberlayne on Evidence, § 1195 *et seq.*

1. See second note, *supra*.

2. See vol. 1 (Blackstone), Wills.

3. In this country they are usually attested in the same manner as devises of realty.

Although documents are necessarily brought before the tribunal by means of verbal or parol evidence, that evidence must be limited to giving such a general description of the document as shall be sufficient to identify it, and deposing to the real evidence afforded by its visible state. Thus, a keeper of records may speak as to the condition in which they are, but not as to their contents.[4] It is commonly said, that "Parol evidence is inferior (or secondary) to written"; that "Written evidence is superior to verbal," etc.; but these axioms must be understood with much allowance and qualification.

The maxims in question have three applications: —

1. **In the case of records and other instruments,** which the policy of the law requires to be in writing and executed with prescribed formalities, no derivative, and consequently **no verbal or other parol evidence of their contents is receivable, until the absence of the original writing is accounted for; neither is parol or other extrinsic evidence receivable; at least in general, to contradict, vary, or explain them.**[5]

2. **A like rule holds where writing or formalities are not required by law, but the parties have had recourse to them for the sake of greater solemnity and security;** as where a man executes a bond to secure the payment of money, when an unattested writing would have been sufficient.[6]

3. **Where the contents of any document are in question, either as a fact directly in issue or a subalternate principal fact, the document is the proper evidence of its own contents.**[7] **But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some act, independent proof aliunde is receivable.** Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it.[8]

But although documentary evidence may not be receivable, for want of being verified on oath or its equivalent, or

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4. Leighton v. Leighton, 1 Stra. 210.

5. Chamberlayne's Best's Evidence, 206; id., Book 3, pt. 2, ch. 3, *post*.

6. Id.

7. Id.

8. Id.; Rambert v. Cohen, 4 Esp. 213.

traceable to the party against whom it is offered, **the benefit of its permanence is not always lost to justice.** Thus, a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination, as a script **to refresh his memory.**[9]

As connected with this subject may be noticed the **maxim** of law, "**Nihil tam conveniens est naturali aequitati, unumquodque dissolvi eo ligamine quo ligatum est.**"[1] "Quomodo quid constituitur," says one of our old books, "eodem modo dissolvitur; record per record, escript per escript, parliament per parliament, parol per parol." For instance, things that lie in grant, as they must be created by deed, cannot be surrendered without deed. But the performance of a condition in an instrument under seal may be proved by inferior evidence. Thus, payment of a bond may be proved by parol, etc.[2]

"**Parol,**" **or, to speak more correctly, "extrinsic" evidence, is not in general receivable to contradict, vary or explain written instruments.**[3] **But there are many cases where the rejection of such proof would be the height of injustice:—**

1. **With respect to the varying or explaining of instruments** there are two rules: "**Ambiguitas verborum patens nulla verificatione excluditur;**" "**Ambiguitas verborum latens verificatione suppletur;** nam quod ex facto oritur ambigumm, verificatione facti tollitur."[4] *"Ambiguitas patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or

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9. Burton v. Plummer, 2 A. & E. 341; Beech v. Jones, 5 C. B. 696; 2 Phill. Ev. (10th Ed.) 480 *et seq.*

1. Nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding. Broom's Leg. Max., *785.

2. West v. Blakeway, 3 Scott N. B. 199 and cases therein cited.

3. 5 Co. 26a; Chamberlayne's Best's Evidence, 208, 217, note.

4. See Lofft's Max., 249; Broom's Leg. Max., *541. A patent ambibuity of words may not be removed by evidence; a latent ambiguity of words may be supplied by evidence.

instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."[5]

2. There are some other exceptions to the rule rejecting intrinsic evidence to affect written instruments. Foremost among them come those **cases where it is sought to impeach written instruments as having been obtained by duress, menace, fraud, covin, or collusion**; which, as is well known, vitiate all acts, however solemn, or even judicial. But the party to an instrument is estopped from setting up his own fraud, etc. to avoid the instrument; also are those claiming under him; and the like rule holds in the case of menace or duress.[6]

3. Another exception is to be found in the admissibility of the **evidence of usage in aid of the construction of written instruments.** This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind,—when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost foreign language. The terms used in these instruments are to be interpreted according to the recognized practice and usage with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties.

Where the language of the contract itself manifests an intention to exclude the operation of usage, evidence of usage cannot be admitted. And in all cases in which this evidence is admitted, it must be presumed that the usage was known to the contracting parties, and that they contracted in reference to it, and in conformity with it.

But "**the rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to, or inconsistent with, the written**

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5. See 1 Chamberlayne's Evidence, § 135; Chamberlayne's Best's Evidence, 208; 2 Phill. Ev. (10th Ed.), ch. 8; Sherratt v. Mountfort, L. R. 8 Ch. App. 928.

6. Chamberlayne's Best's Evidence, 209 and authorities cited.

contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication." And, lastly, **where the incident sought to be annexed to a contract is of such a nature that the parties are not themselves competent to introduce it by express stipulation, such an incident cannot be annexed by the tacit stipulation arising from usage.**[7]

Imperfections or blemishes apparent on the face of a document, such as interlineations, erasures, etc., do not vitiate the document, unless they are in some material part of it. One of our old books lays down generally, that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after." Other authorities seem disposed to extend this doctrine to erasures; and both positions have been confirmed by the Court of Queen's Bench.[8] But that **an erasure or alteration in a suspicious place must be explained** by the party seeking to enforce the instrument, has been law from the earliest times.

7. See, generally, as to the effect of usage and custom on a contract, 1 Chamberlayne on Evidence, § 756 *et seq.*; Chamberlayne's Best's Evidence, 210, 223, note; and the leading case of Wigglesworth v. Dallison, Doug., 201; 1 Smith's L. C. *670 and notes.

8. Doe *ex dem.* Tatum, 16 Q. B. 745; Chamberlayne's Best's Evidence, 212. See, also, 2 Chamberlayne on Evidence, § 1081 *et seq.*

CHAPTER II.

PROOF OF HANDWRITING.

The proof of handwriting in cases other than those where the fact that a certain document was written is proved by eye-witnesses, or by the admissions of parties, or is inferred from circumstances. **A person who has ever seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of that party, is a competent witness** to say whether he believes[1] the handwriting of the disputed document to be genuine or not. The having seen the party write once, no matter how long ago, or having seen him merely write his signature, or even only his surname, is sufficient to render the evidence admisible: the weakness of it is matter of comment for the jury.[2]

"Knowledge of handwriting may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them, by written answers producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party, evidence of the identity of the party being of course added *aliunde,* if the witness be not personally acquainted with him.[3] The number of papers, however, which the witness may have

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1. In this country the statement usually is "that in his opinion the handwriting," etc., instead of that "he believes," etc.

2. See Eagleton v. Kingston, 8 Ves. 474; Willman v. Worrall, 8 C. & P. 380; Lewis v. Sapio, 1 M. & M. 39; 3 Chamberlayne on Evidence, § 2202 *et seq.*

3. 3 Chamberlayne on Evidence, § 2203 *et seq.;* Chamberlayne's Best's Evidence, 228.

seen in the handwriting of the party is perfectly immaterial, so far as relates to the *admissibility* of the evidence. Nor is it absolutely necessary for this purpose that any act should be done or business transacted by the witness in consequence of the correspondence. "The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed."

It seems, however, that in order to render admissible either of the above modes of proof of handwriting, **the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered.**[4]

Under what circumstances is it competent to prove the handwriting of a party to a document, by a comparison or collation instituted between it and other documents proved or assumed to be in his handwriting? By the general rule of the common law, such evidence was not receivable.

There are several **common law exceptions to the rule which excludes proof of handwriting by comparison:** —

1. **It is competent for the court and jury [with or without the aid of experts] to compare the handwriting of a disputed document with any others which are in evidence in the cause, and which are admitted or proved to be in the handwriting of the supposed writer.**[5]

2. Another exception is the case of **ancient documents.**

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4. There is no doubt of the correctness of this rule. 3 Chamberlayne on Evidence, § 2204 and cases cited.

5. This is the rule in Illinois. Brobston v. Cahill, 64 Ill. 328, and cases there cited.

In many instances the common law rule which forbids the comparison of handwriting by court, jury or experts with other specimens than those regularly in evidence in the cause operates as a denial of justice. The rule has accordingly been changed by statute in the federal courts (in 1914) and in many of the states, as well as in England. See 3 Chamberlayne on Evidence, §§ 2244-2262, where the authorities are fully collected. Letter press copies cannot be used as standards. Id., 2269, citing Spottiswood v. Weir, 66 Cal. 525; Com. v. Eastman, 1 Cush. 189, 217; Cohen v. Teller, 93 Pa. St. 123; Howard v. Russell, 75 Tex. 171. See, also, the above cases (except Cohen v. Teller), as to the use of traced copies.

When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, the law, acting on the maxim, "Lex non cogit impossibilia," allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one. It is not easy to determine the precise degree of antiquity which is sufficient to let in evidence of this nature. In Roe d. Brune v. Rawlings,[6] the supposed writer had been dead about sixty years; in Doe d. Tilman v. Tarver,[7] the writing was nearly one hundred years old; and in Doe d. Jenkins v. Davies[8] it was eighty-four years old.[9]

In order to disprove handwriting, evidence has frequently been adduced of persons who have made it their study, and who, though unacquainted with that of the supposed writer, undertake, from their general knowledge of the subject, to say whether a given piece of handwriting is in a feigned hand or not. Much difference of opinion has prevailed relative to the admissibility of this sort of evidence; but according to the present practice it is generally received without objection.[1]

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6. 7 East, 282, note a.
7. R. & M., 141.
8. 10 Q. B. 314.
9. 3 Chamberlayne on Evidence, § 2225.

1. See, generally, Rogers on Expert Testimony and Lawson on Expert Testimony.

BOOK III.

RULES REGULATING THE ADMISSIBILITY AND EFFECT OF EVIDENCE.

PART I.

THE PRIMARY RULES OF EVIDENCE.

The primary rules of evidence may all be ranged under three heads:—

1. **To what subjects evidence should be directed.**
2. **The burden of proof, or *onus probandi*.**
3. **How much must be proved.**[1]

CHAPTER I.

TO WHAT SUBJECTS EVIDENCE SHOULD BE DIRECTED.

Of all rules of evidence, the most universal and the most obvious is this,— that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation.

Evidence may be rejected as irrelevant for one of two reasons. 1st. **That the connection between the principal and evidentiary facts is too remote and conjectural.** 2d. **That it is excluded by the state of the pleadings,** or what is analogous to the pleadings; **or is rendered superfluous by the**

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1. The four principal rules of the law of evidence are: (1) The evidence must correspond with the allegation and be confined to the point in issue; (2) The substance of the issue only need be proved; (3) The *onus probandi*, or burden of proof, is with the affirmative of the issue; (4) The best evidence of which the case is susceptible must always be produced. This last rule has already been considered, *ante*. These rules are too fundamental to need authority. See, generally, as to relevancy, Chamberlayne on Evidence, title, "Relevancy," where the subject is considered in great detail and the cases collected in the notes. See, also, Chamberlayne's Best's Evidence, 241-251 and notes.

admissions of the party against whom it is offered. The use of pleadings, or of some analogous statement of the cases of the contending parties, is to enable the tribunal to see the points in dispute, and the parties to know beforehand what they should come prepared to attack or defend: consequently, although a piece of evidence tendered might, if merely considered *per se,* establish a legal complaint, accusation, or defence; yet, as the opposite party has had no intimation beforehand that that ground of complaint, etc., would be insisted on, the adducing evidence of it against him would be taking him by surprise and at a disadvantage.

There are certain matters which it is unnecessary to prove, i. e.: 1. Matters noticed by the courts ex officio. 2. Matters deemed notorious.

1. An enumeration of the matters which the courts, in obedience to common or statute law, notice *ex officio,* would here be out of place. Suffice it to say, generally, that, besides noticing **the ordinary course of nature, seasons, times, etc.,** the courts notice without proof **various political, judicial, and social matters.** Thus they notice **the political constitution** of our own government; the **territorial extent** of the jursdiction and sovereignty exercised *de facto* by it; **the existence and titles of other sovereign powers; the jurisdiction of the superior courts,** and courts of general jurisdiction; **the seals** of the superior courts, and many others; **the custom or law of the road,** that horses and carriages shall respectively keep on the left[2] side, etc. In all cases of this kind, where the memory of a judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence. Thus, if the point at issue be a date, the judge will refer to an **almanac.**[3]

2. **The law of England is very slow in recognizing matters as too notorious to require proof,** and it is not easy to lay down a definite rule respecting them. The language of Wilde, C. J., in the case of Ernest Jones,[4] who was indicted

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2. Right in this country.

3. See, generally, 1 Chamberlayne on Evidence, § 573 *et seq.*

4. Centr. Cr. Court, 1841, MS.

for making a seditious speech at a public meeting, seems to throw some light on this subject. The Lord Chief Justice there told the jury, that they should take into consideration what they knew of the state of the country, and of society generally, at the time when the language was used. What might be innoxious at one time, when there was a general felling of contentment, might be very dangerous at another time, when a different feeling prevailed. But that they could not, without proof of them, take into their consideration particular facts attending the particular meeting at which the words were spoken.[5]

The rejection of evidence on the ground of remoteness, or want of reasonable connection between the principal and evidentiary facts, is a branch of that fundamental principle of **our law** which **requires the best evidence** to be adduced. The rule has no application where the evidence tendered is either direct, or, though circumstantial, is necessarily conclusive upon the isue. **But whether a given piece of presumptive evidence is receivable, or ought to be rejected on this ground,** is not unfrequently a question of considerable difficulty. On the question between landlord and tenant, as to the terms on which the premises were held, although it might assist to know the terms on which the landlord usually let to his other tenants, not connected with the tenant whose case is under consideration, the evidence would be rejected as too remote.[6]

But acts unconnected with the act in question are frequently receivable to prove psychological facts, such as intent. Thus, on an indictment for uttering a forged banknote, evidence is admissible that the acused has uttered similar forged notes, etc. On an indictment for poisoning one person, evidence is admissible that the accused has previously or subsequently poisoned other persons.[7]

Admissibility of evdence to character. According to the general rule, it is not competent to give evidence of the

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5. Rex v. Dowling, cited Arch. Cr. Pl. (5th Ed.) 147; Chamberlayne's Best's Evidence, 243.

6. Carter v. Pryke, 1 Peake, 95.

7. Rex v. Wylie, 2 Leach, 983; Rex v. Garner, 3 F. & F. 681; Chamberlayne's Best's Evidence, 244; 4 Chamberlayne on Evidence, § 3222 *et seq.*

general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with the view of raising a presumption either favorable to one party or disadvantageous to his antagonist.[8]

But where the very nature of the proceedings is such as to put in issue the character of any of the parties to them, a different rule necessarily prevails; and it is not only competent to give general evidence of the character of the party with references to the issue raised, but even to inquire into particular facts tending to establish it. Thus, on an indictment for keeping a common bawdy-house, or common gaming-house, the prosecutor may give in evidence any acts of the defendant which support the general charge. So, where the issue is whether a party is *non compos mentis,* proof may be adduced of particular acts of insanity. In actions for seduction, the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct, or proof of particular acts of it.[9]

Although, in criminal prosecutions in general, the character of the accused is not in the first instance put in issue, still in all cases where the direct object of the proceedings is to punish the offence,— such as indictments for treason, felony, or misdemeanor, — and is not merely the recovery of a penalty, **it is competent to him to defend himself by proof of previous good character,** reference being had to the nature of the charge against him.[1]

The inquiry in such cases should be as to his general character among those who have known him. And even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused, is inadmissible.

Whenever it is allowable to impeach the character of a party, it is competent to the other side to give evidence to contradict the evidence adduced.[2] And although, in a criminal prosecution, evidence cannot in the first instance be given to show that the accused has borne a bad character,

8. 4 Chamberlayne on Evidence, § 3282 *et seq.* and cases cited.

9. See, generally, 4 Chamberlayne on Evidence, §§ 3281, 3285.

1. Id., § 3270 *et seq.*

2. Id.; Chamberlayne's Best's Evidence, 247.

still, if he sets up his character as an answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony. But, as it is not competent for the accused to show particular acts of good conduct, the prosecutor cannot, in general, go into particular cases of misconduct.[3]

The credibility of a witness is always in issue; and accordingly general evidence is receivable, to show that the character which he bears is such that he is unworthy to be believed, even when upon his oath.[4] But evidence of particular facts, or particular transactions, cannot be received for this purpose. The witness may indeed be questioned as to such facts or transactions; but he is not always bound to answer; and if he does, the party questioning is bound to take his answer, and cannot call evidence to contradict it.

In determining the relevancy of evidence to the matters in dispute in a cause, it is of the utmost importance to remember, that **the question is whether the evidence offered is relevant to any of them.** 1. Evidence not admissible to prove some of the issues or matters in question, may be admissible to prove others. 2. Evidence not admissible in the first instance may become so by matter subsequent. 3. Evidence may be admissible to prove a subordinate principal fact, which might not be admissible to prove the immediate fact in issue. This is of course subject to the rule requiring the best evidence.[5]

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3. Id.

4. The credit of a witness who has been examined in chief may be impeached: (1) By disproving the facts testified to by him by other witnesses; (2) By proof that the witness has made statements out of court contrary to his testimony at the trial, and (3) By general evidence affecting his credit for veracity; but in such case the examination must be confined to his general reputation and not be extended to particular facts. The regular mode is to inquire whether the impeaching witness knows the general reputation of the person in question among his neighbors, or in the neighborhood where he resides; and, if the witness answers in the affirmative, what that reputation is. See 1 Greenl. Ev., § 461 and cases cited; 3 Chamberlayne on Evidence, § 3276; Chamberlayne's Best's Evidence, 257, note, and cases cited.

5. Chamberlayne's Best's Evidence, 250.

CHAPTER II.

THE BURDEN OF PROOF.

Every controversy ultimately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties, which are denied, or at least not admitted, by the other. Now, where there are no antecedent grounds for supposing that what is asserted by the one party is more probable than what is denied by the other, and the means of proof are equally accessible to both, **the party who asserts the fact or proposition must prove his assertion,**— the burden of proof, or *onus probandi,* lies upon him; and the party who denies that fact or proposition need not give any reason or evidence to show the contrary, until his adversary has at least laid some probable grounds for the belief of it. The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof of his adversary. The plaintiff is bound in the first instance to show at least a *prima facie* case, and if he leaves it imperfect the court will not assist him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter, which, if true, is an answer to it **the burden of proof changes sides;** and he in his turn is bound to show a *prima facie* case at least, and if he leaves it imperfect the court will not assist him. And although the burden of proof must, in the first instance, be determined by the issues as they appear on the pleadings, or whatever according to the practice of the court and nature of the case is analagous to pleadings, it may, and frequently does, shift in the course of a trial.

In order to determine on which of two litigant parties the burden of proof lies, the following **test** has been suggested by Alderson, B., viz.: **"Which party would be successful if no evidence at all were given?"**[1] As, however,

1. Amos v. Hughes, 1 Moo. & R. 464, per Alderson, B.; 8 C. & P. 720; 14 M. & W. 100.

the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed thus, viz.: "**Which party would be successful, if no evidence at all, or no more evidence, as the case may be, were given?**"[2]

1. **The general rule is, that the burden of proof lies on the party who asserts the affirmative of the issue,** or question in dispute.[3]

It has been rashly inferred, and is frequently asserted, that "a negative is incapable of proof,"— a position wholly indefensible if understood in an unqualified sense. **But when the negative ceases to be a simple one,— when it is qualified by time, place, or circumstance,— proof of a negative may very reasonably be required, when the qualifying circumstances are the direct matter in issue,** or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.[4]

But here two things must be particularly attended to: first, **not to confound negative averments, or allegations in the negative, with traverses of affirmative allegations;** and, secondly, **to remember that the affirmative and negative of the issue mean the affirmative and negative of the issue in substance, and not merely its affirmative and negative in form.** With respect to the former, it a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does *not* exist, or that a particular thing is insufficient for a particular purpose, and such like,— these, although they resemble negatives, are not negatives in reality,— they are, in truth, positive averments, and the party who makes them is bound to prove them.[5]

Again, the incumbency of proof is determined by the affirmative in substance, not the affirmative in **form.** Thus, in an action of covenant on a demise, whereby the defend-

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2. Baker v. Batt, 2 Moo. P. C. C. 319.

3. Chamberlayne's Best's Evidence, 262.

4. Id., 262, 263, 268, note.

5. Berty v. Dermor, 12 Mod. 526; Harney v. Towers, 15 Jur. 545.

ant covenanted to repair and paint a house, the plaintiff alleged as breaches, that the defendant did not repair or paint the house, and the defendant pleaded that he did. On these pleadings, it was held that the plaintiff had the right to begin, as the burden of proof lay on him.[6]

2. **The burden of proof is shifted by those presumptions of law which are rebuttable**; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a *prima facie* case against a party. When a presumption is in favor of the party who asserts the negative, it only affards an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative.[7]

3. A third circumstance may affect the burden of proof, namely, **the capacity of parties to give evidence.** "The law will not force a man to show a thing which by intendment of law lies not within his knowledge."[8] It is a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant.

4. This rule is of very general application: it holds good whether the proof of the issue involves the proof of an affirmative or of a negative, and has even been allowed to prevail against presumptions of law. But the authorities are by no means agreed as to the extent to which it ought to be carried.[9]

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6. Seward v. Leggatt, 7 C. & P. 613.
7. See *post*, Presumptions.
8. Plowd., 46; Chamberlayne's Best's Evidence, 265.
9. Id.

CHAPTER III.

HOW MUCH MUST BE PROVED.

It is sufficient if the issues raised are proved in substance.[1]

All averments which might be expunged from the record, without affecting the validity of the pleading in which they appear, may be disregarded at the trial; for such averments only encumber the record, and the proof of them would be as irrelevant as themselves.[2]

But matter which need not have been stated may be injurious, or even fatal, when it affects that which is material. A party may allege or prove things which he was not bound to allege or prove, but which, when alleged or proved, put his case out of court. Averments, though unnecessarily introduced, cannot be rejected when they operate by way of description or limitation of essentials.[3]

This rule does not merely absolve from proof of irrelevant matter. It has a far more general application; and means that the tribunal by which a cause is tried should examine the record or allegations of the contending parties, or of their advocates, as the case may be, with a legal eye, in order to ascertain the real question raised between them. Thus, although in actions on contracts the contract must be correctly stated, and proved as laid; yet in actions on simple contract, as also in actions of tort, the plaintiff may recover for a less sum than that claimed in the declaration. And in actions of tort it is, generally, sufficient to prove a substantial portion of the trespasses or grievances complained of.[4]

The rule in question is not confined to civil cases. It is a principle runing through the whole criminal law, that it is sufficient to prove so much of an indictment as charges the accused with a substantive crime.[5]

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1. Co. Litt., 227a, 281b, 282a; Litt., ss. 483-485; Chamberlayne's Best's Evidence, 271.
2. 2 Saund. 369; 10 Co. 110a; Chamberlayne's Best's Evidence, 271.
3. See Pleading.
4. Chamberlayne's Best's Evidence, 272.
5. Id.

But although the law is thus liberal in looking through mere form, in order to see the real substance of the questions raised, **a positive variance or discrepancy between a pleading and the proof adduced in support of it is fatal,**— a rule considered necessary to prevent the opposite party from being unfairly taken by surprise, and the whole system of pleading converted into a snare.[6]

6. The student should here consult the statutes concerning amendments.

PART II.

THE SECONDARY RULES OF EVIDENCE.

The secondary rules of evidence are those rules which relate to the modus probandi, or mode of proving the matters that require proof. **The fundamental principle of the common law on this subject is, that the best evidence must be given,** — a maxim the general meaning of which has been explained in a former part of this work.[1] In certain cases, however, peculiar forms of proof are either prescribed or authorized by statute. The whole matter may be treated in the following order: —

1. **Direct and Circumstantial Evidence.**
2. **Presumptive Evidence, Presumptions, and Frictions of Law.**
3. **Primary and Secondary Evidence.**
4. **Derivative Evidence in general.**
5. **Evidence supplied by the Acts of Third Parties.**
6. **Opinion Evidence.**
7. **Self-regarding Evidence.**
8. **Evidence rejected on Grounds of Public Policy.**
9. **Authority of Res Judicata.**
10. **Quantity of Evidence required.**

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1. Book 1, pt. 1, *ante*.

CHAPTER I.

DIRECT AND CIRCUMSTANTIAL EVIDENCE.

ALL judicial evidence is either *direct* or *circumstantial*. **By "direct evidence" is meant when the principal fact, or factum probandum, is attested directly by witnesses, things, or documents. To all other forms the term "circumstantial evidence" is applied; which may be defined, that modification of indirect evidence, whether by witnesses, things, or documents, which the law deems sufficiently proximate to a principal fact, or factum probandum, to be receivable as evidentiary of it.** And this also is of two kinds, conclusive and presumptive: "**conclusive,**" when the connection between the principal and evidentiary facts — the *factum probandum* and *factum probans*[1] — is a **necessary consequence** of the laws of nature; as where a party accused of a crime shows that, at the moment of its commission, he was at another place, &c.: "**presumptive**" when the inference of the principal fact from the evidentiary is **only probable,** whatever be the degree of persuasion which it may generate.

As regards admissibility, direct and circumstantial evidence stand, generally speaking, on the same footing. It might at first sight be imagined that the latter, especially when in a presumptive shape, is inferior or secondary to the former, and that, by analogy to the principle which excludes second-hand and postpones secondary evidence, it ought to be rejected, at least when direct evidence can be procured. The law is, however, otherwise. **Circumstantial evidence, whether conclusive or presumptive, is as original in its nature as direct evidence:** both are distinct modes of proof, acting as it were in parallel lines wholly independent of each other. Still, the non-production of direct evidence which it is in the power of a party to produce is

1. The fact to be proved and the fact that proves.

matter of observation to a jury, as indeed is the suppression of any sort of proof.[2]

Direct and presumptive evidence (using the words in their technical sense) being, as has been shown, distinct modes of proof, **have each their peculiar advantages and characteristic dangers.** Abstractly speaking, presumptive evidence is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an indirect mode of proving that which otherwise might not be provable at all. Hence, a given portion of credible direct evidence must ever be superior to an equal portion of credible presumptive evidence of the same fact. But in practice it is from the nature of things impossible, except in a few rare and peculiar cases, to obtain more than a very limited portion of direct evidence as to any fact, especially any fact of a criminal kind; and with the probative force of such a limited portion of direct evidence, that of a chain of evidentiary facts, forming a body of presumptive proof, may well bear comparison.[3]

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2. 1 Stark's Ev. (3d Ed.) 578; id. (4th Ed.) 874; Chamberlayne's Best's Evidence, 276, 277; 3 Chamberlayne on Evidence, § 1712 and note 3.

3. See next note *ante*.

CHAPTER II.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS, AND FICTIONS OF LAW.

The elements, or links which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the number, weight, independence, and consistency of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish.[1] Thus, on an indictment for uttering a bank-note knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing, — any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong.[2]

It is, however, of the utmost importance to bear in mind, first, that, **if all the circumstances proved arise from one source, they are not independent of each other; and that an increase in the number of the circumstances will not in such a case increase the probability of the hypothesis:** secondly, that, **where a number of independent circumstances point to the same conclusion, the probability of the justness of that conclusion is, not the sum of the simple probabilities of those circumstances, but the compound result of them:** and lastly, that, **the circumstances composing the chain must all be consistent with each other.**[3]

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1. See Richardson's Case, Chamberlayne's Best's Evidence, Appendix No. 1.

2. See 4 Chamberlayne on Evidence, § 3225; Rex v. Green, 3 Car. & K. 209; Chamberlayne's Best's Evidence, 281, 282 and note.

3. Chamberlayne's Best's Evidence,

The term "**presumption,**" in its largest and most comprehensive signification, **may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning, from something proved or taken for granted.** It is, however, rarely employed in jurisprudence in this extended sense. Like "presumptive evidence," it has there obtained a **restricted legal signification**; and is used to designate **an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact,** either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal.[4]

But the English term "Presumption" has been used by jurists and lawyers in several different senses: 1. **The original or primary sense** above stated. 2. **The strict legal sense,** there explained. 3. **A generic term including every sort of rebuttable presumption**; i. e., rebuttable presumptions of law, strong presumptions of fact, mixed presumptions, or masses of evidence, direct or presumptive, which shift the burden of proof to the opposite party. 4. **A generic term applicable to certain, as well as to contingent inferences.** 5. On the other hand, the word *presumption* has even been restricted to the sense of **irrebuttable presumption.**

6. **The popular sense of presumptuousness,** arrogance, blind adventurous confidence, or unwarrantable assumption. 7. **The Latin "praesumptio"** had, at one time at least, another signification. In the Leges Hen. I., c. 10, § 1, we find the expression "Praesumptio terre vel pecunie regis"; where "praesumptio" is used in the sense of "**invasio,**" "intrusio," or "usurpatio."[5]

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282 and authorities cited; id., 304, note.

4. See, generally, 2 Chamberlayne on Evidence, § 1027 *et seq.* and notes.

5. See 2 Chamberlayne on Evidence, § 1026.

SECTION I.

Presumptive Evidence, Presumptions generally, and Fictions of Law.

PRESUMPTIVE evidence, and the presumptions to which it gives rise, are not indebted for their probative force to positive law. When inferring the existence of a fact from others, courts of justice do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being would, under similar circumstances, have applied for itself; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the usages and habits of society. All such inferences are called by our lawyers "**presumptions of fact,**"[6] or "natural presumptions," in order to distinguish them from others of a technical kind, more or less of which are to be found in every system of jurisprudence, and which are known by the name of "**presumptions of law.**"[7] To these two classes may be added a third, which, as partaking in some degree of the nature of each of the former, may be called "**mixed presumptions,**" or "presumptions of mixed law and fact." And — as presumptions of fact are both unlimited in number, and from their very nature are not so strictly the object of legal science as presumptions of law — we purpose to deal with the latter first, together with the kindred subject of fictions of law. We shall then treat of the former, together with mixed presumptions; and the present section will conclude with a notice of conflicting presumptions.

SUBSECTION I.

Presumptions of Law, and Fictions of Law.

Presumptions, or, as they are also called, "intendments" of law, are inferences or positions established by law, common or statute. They differ from presumptions of fact and

6. See id., § 1027.

7. See Chamberlayne on Evidence, title, Presumptions of Law.

mixed presumptions in two most important respects. **First,** that in the latter a discretion, more or less extensive, as to drawing the inference, is vested in the tribunal; while in those now under consideration **the law peremptorily requires a certain inference to be made,** whenever the facts appear which it assumes as the basis of that inference. **Second,** as presumptions of law are, in reality, rules of law, and part of the law itself, **the court may draw the inference whenever the requisite facts are before it;** while other presumptions, however obvious, being inferences of fact, could not, at common law, be made without the intervention of a jury.[8]

The grounds of these praesumptiones juris are various. Some of them are natural presumptions, which the law simply recognizes and enforces, such as the legal maxim that every one must be presumed to intend the natural consequence of his own act. But in most of the presumptions which we are now considering, the inference is only partially approved by reason, — the law, from motives of policy, attaching to the facts which give rise to it an artificial effect beyond their natural tendency to produce belief. Thus, although a receipt for money under hand and seal naturally gives rise to a presumption of payment, still it does not necessarily prove it; and the conclusive effect of such a receipt is a creature of the law. To these may be added a third class, in which the principle of legal expediency is carried so far as to establish inferences not perceptible to reason at all, and perhaps even repugnant to it. Thus, when the law punishes offences, even *mala prohibita,* on the assumption that all persons in the kingdom, whether natives or foreigners, are acquainted with the common and general statute law, it manifestly assumes that which has no real existence whatever, though the arbitrary inference may be dictated by the soundest policy.

Of presumptions of law, some are absolute and conclusive, called by the common lawyers **irrebuttable presump-**

8. See, generally, 2 Chamberlayne on Evidence, § 1185 *et seq.*; Chamberlayne's Best's Evidence, 286 *et seq.*

tions, and by the civilians *praesumptiones juris et de jure;* while others are **conditional, inconclusive, or rebuttable,** and are called by the civilians *praesumptiones juris tantum,* or simply *praesumptiones juris.* The former kind are **inferences which the law makes so peremptorily** that it will not allow them to be overturned by any contrary proof, however strong. Thus, a bond or other specialty is presumed to have been executed for good consideration, and no proof can be admitted to the contrary, unless the intrument is impeached for fraud.[9]

" Fictions of law " are closely allied to irrebuttable presumptions of law; in other words, fictions of law are where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible. The difference between fictions of law and *praesumptiones juris et de jure* consists in this, that the latter are arbitrary inferences, which may or may not be true; while in the case of fictions the falsehood of the fact assumed is understood and avowed.

Fictions of law, as is justly observed by Mr. Justice Blackstone,[1] though they may startle at first, will be found on consideration to be **highly beneficial and useful.**

Fictions are only to be made for necessity, and to avoid mischief, and consequently they must never be allowed to work prejudice or injury to an innocent party.

The matter assumed as true must be something physically possible.

Fictions of law are of three kinds: affirmative or positive fictions, negative fictions, and fictions of relation.

In the case of **affirmative fictions,** something is assumed to exist which in reality does not; such as the fiction of lease, entry, and ouster, in actions of ejectment.[2]

In **negative fictions,** on the contrary, that which really exists is treated as if it did not.

Fictions of relation are of four kinds: — First, where the act of one person is taken to be the act of another; as where the act or possession of a servant is deemed the act or

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9. Chamberlayne's Best's Evidence, 288.

1. Vol. 1 (Blackstone), Book 3, *43.

2. See Pleading.

possession of his master. Second, where an act done by or to one thing is taken, by relation, as done by or to another; as where the possession of land is transferred by livery of seisin, or a mortgage of land is created by delivery of the title deeds. Third, fictions as to place; as in the case of a contract made at sea, or abroad, being treated as if made in England, and the like. Fourth, fictions as to time. It is on this principle that the title of an executor or administrator to the goods of the testator or intestate relates back to the time of his death, and does not take effect merely from the probate, or grant of the letters of administration.[3]

The other kind of presumptions of law, called **rebuttable presumptions**, or *praesumptiones juris tantum*, has been thus correctly defined: "Praesumptio juris dicitur, quae ex legibus introducta est, ac pro veritate habetur, donec probatione aut praesumptione contraria fortiore enervata fuerit."[4] First, like the former class, **these presumptions are intendments made by law**; but, unlike them, **they only hold good until disproved.** Thus, the legitimacy of a child born during wedlock may be rebutted by proof of the absence of the opportunity for sexual intercourse between its supposed parents. To this class also belong the well-known presumptions in favor of innocence and sanity, and against fraud. This species of presumptions may be rebutted by presumptive as well as by direct evidence, and the weaker presumption will give place to the stronger.[5]

SUBSECTION II.

Presumptions of Fact, and Mixed Presumptions.

I. **The grounds or sources of presumptions of fact** are obviously innumerable; they are coextensive with the facts, both physicial and psychological, which may, under any

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3. Chamberlayne's Best's Evidence, 292.

4. A presumption of law is said of that which has been introduced by law and is held as true until by stronger proof or presumption to the contrary it is overthrown.

5. Chamberlayne's Best's Evidence, 2930 and notes; 2 Chamberlayne on Evidence, §§ 1115, 1226 *et seq.*

circumstances whatever, become evidentiary in courts of justice; but, in a general view, such presumptions may be said to relate to things, persons, and the acts and thoughts of intelligent agents. With respect to the first of these, it is an established principle that **conformity with the ordinary course of nature ought always to be presumed.** Thus, the order and changes of the seasons, the rising, setting, and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts, or things. **The same rule extends to persons.** Thus, the absence of those natural qualities, powers, and faculties which are incident to the human race in general will never be presumed in any individual: such as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man, etc. To this head are reducible the presumptions which juries are sometimes called on to make, relative to the duration of human life, the time of gestation, etc. Under the third class, namely, the acts and thoughts of intelligent agents, come, among others, all psychological facts; and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man will ever be presumed to throw away his property, as, for instance, by paying money not due; and so it is a maxim, that every one must be taken to love his own offspring more than that of another person. Many presumptions of this kind are founded on the customs and habits of society; as, for instance, that a man to whom several sums of money are owing by another will first call in the debt of longest standing.[6]

II. With respect to their degree of probative force, presumptions are, according to Lord Coke, of three sorts, viz.: "violent, probable, and light or temerary. *Violenta praesumptio* is many times *plena probatio; praesumptio probabilis* moveth little; but *praesumptio levis seu temeraria*

6. See 2 Chamberlayne on Evidence, § 1197 *et seq.*; Chamberlayne's Best's Evidence, Book 3, pt. 2, subsec. 2, p. 294 *et seq.*

moveth not at all." "Praesumptio violenta valet in lege."[6a]

The utility of the classification of presumptions of fact into violent, probable, and light is questionable; but if it be thought desirable to retain it, the following good illustration is added from a well-known work on criminal law: "Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and entitled to no weight."[7]

A division of presumptions of fact, more accurate in principle and more useful in practice, is obtained by considering them with reference to their effect on the burden of proof, or *onus probandi*. **Praesumptiones hominis, or presumptions of fact, are divided into slight and strong, according as they are or are not of sufficient weight to shift the burden of proof.**

Slight presumptions, although sufficient to excite suspicion, or to produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either constitute proof or shift the burden of proof. Thus, the fact of stolen property being found in the possession of the supposed criminal, a long time after the theft, though well calculated to excite suspicion against him, is, when standing alone, insufficient even to put him on his defence.[8]

But although presumptions of this kind are of no weight when standing alone, still they not only form important links in a chain of evidence, and frequently render complete

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6a. A violent presumption prevails in law.

7. Chamberlayne's Best's Evidence, § 319; Arch. Cr. Pl. (19th Ed.), 259.

8. See next note, *supra*.

a body of proof which would otherwise be imperfect, but the concurrence of a large number of them may, each contributing its individual share of probability, not only shift the *onus probandi*, but amount to proof of the most convincing kind.[9]

Strong presumptions of fact, on the contrary, shift the burden of proof, even though the evidence to rebut them involved the proof of a negative. The evidentiary fact giving rise to such a presumption is said to be "*prima facie* evidence" of the principal fact of which it is evidentiary. Thus, possession is *prima facie* evidence of property; and the recent possession of stolen goods is sufficient to call on the accused to show how he came by them, and, in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them.[1]

Presumptions of this nature are entitled to great weight, and, when there is no other evidence, are generally decisive in civil cases. In criminal, and more especially in capital cases, a greater degree of caution is, of course, requisite, and the technical rules regulating the burden of proof are not always strictly adhered to.[2]

The resemblance between inconclusive presumptions of law, and strong presumptions of fact, cannot have escaped notice,— the effect of each being to assume something as true until it is rebutted; and, indeed, in the Roman law, and in other systems where the decision of both law and fact is intrusted to a singe judge, the distinction between them becomes in practice almost imperceptible. But it must never be lost sight of in the common law, where the functions of judge and jury are usually kept distinct.[3]

"**Mixed presumptions,**" **or, as they are sometimes called,** "**presumptions of mixed law and fact,**" and "**presumptions of fact recognized by law,**" hold a place somewhere between the two foregoing; and consist chiefly of

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9. Chamberlayne's Best's Evidence, § 320 and note.

1. See notes, *supra*.

2. Chamberlayne's Best's Evidence, §§ 321, 322; 27 How. St. Tr. 1282, 1353.

3. By statute in many civil cases the judge may decide both questions of law and fact. Consult the statutes.

certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract as it were the observation of the law; and, from being constantly recommended by judges and acted on by juries, become in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some also have been either introduced or recognized by statute. They are in truth a sort of *quasi praesumptiones juris;* and, like strict legal presumptions, may be divided into three classes: 1st. Where the inference is one which common sense would have made for itself; 2d. Where an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; and, 3d. Where from motives of legal policy juries are recommended to draw inferences which are purely artificial. The last two classes are chiefly found where long-established rights are in danger of being defeated by technical objections, or by want of proof of what has taken place a great while ago; in which cases it is every day's practice for judges to advise juries to presume, without proof, the most solemn instruments, such as charters, grants, and other public documents, as likewise all sorts of private conveyances.[4]

Artificial presumptions of this kind require to be made with caution, and it must be acknowledged that the legitimate limits of the practice have often been greatly overstepped.

The terms in which presumptions of fact and mixed presumptions should be brought under the consideration of juries by the court, depend on their weight, either natural or technical. When the presumption is one which the policy of law and the ends of justice require to be made, the jury should be told that they ought to make the presumption, unless evidence is given to the contrary; it should not be left to them as a matter for their discretion.[5] In the case of presumptions of a less stringent nature, however, such a direction would be improper; and perhaps the

4. See Chamberlayne's Best's Evidence, § 324 *et seq.*

5. Shephard v. Payne, 16 C. B. N. S. 132, 135; Chamberlayne's Best's Evidence, § 326.

best general rule is, that the jury should be advised or recommended to make the presumption.[6]

A characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that, when the former are disregarded by a jury, a new trial is granted as matter of right, but the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court. Now, although questions of fact are the peculiar province of a jury, the courts, by virtue of their general controlling power over everything that relates to the administration of justice, will usually grant a new trial when an important presumption of fact, or an important mixed presumption, has been disregarded by a jury.[7] But new trials will not always be granted when successive juries disregard such a presumption; and the interference of the court in this respect depends very much on circumstances. As a general rule, it may be stated, that not more than one or two new trials would be granted.[8]

SUBSECTION III.

Conflicting Presumptions.

Rebuttable presumptions of any kind may be encountered by presumptive, as well as by direct evidence; and the court may even take judicial notice of a fact — such, for example, as the increase in the value of money — for the purpose of rebutting a presumption which would otherwise have arisen from uninterrupted modern usage. **The relative weight of conflicting presumptions of law is to be determined by the court or judge,** — who should also direct the attention of the jury to the burden of proof as affected by the pleadings, and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases, to be guided by those rules regulating the burden of proof and the weight of conflicting presumptions, which are recognized

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6. Rex v. Joliffe, 2 B. & C. 54.
7. Turnley v. Black, 44 Ala. 159.
8. Chamberlayne's Best's Evidence, § 327 and note, where the American cases are collected.

by law, and have their origin in natural equity and convenience. It must not, however, be supposed that every *praesumptio juris* is, *ex vi termini,* stronger than every *praesumptio hominis,* or *praesumptio mixta;* on the contrary, which of any two presumptions ought to take precedence must be determined by the nature of each. The presumption of innocence, for instance, is *praesumptio juris;* but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent possession of stolen property,— which is at most only *praesumptio mixta.*[9]

The following rules, provided they are understood as being merely rules for general guidance, and not rules of universal obligation, are likely to be serviceable in practice.

I. **Special presumptions take precedence of general.** This is the chief rule.[1]

II. **Presumptions derived from the course of nature are stronger than casual presumptions.** This is a very important rule, derived from the constancy and uniformity observable in the works of nature, which render it probable that human testimonies, or particular circumstances which point to a conclusion at variance with its laws, are, in the particular instance, fallacious.[2]

III. **Presumptions are favored which give validity to acts.**[3]

IV. **The presumption of innocence is favored in law.** This is a well-known rule, and runs through the whole criminal law; but it likewise holds in civil proceedings.[4]

SECTION II.

Presumptions of Law and Fact usually met in Practice.

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9. Chamberlayne's Best's Evidence, §§ 328, 329.

1. Chamberlayne's Best's Evidence, § 331 and authorities cited.

2. Id., § 332.

3. Id., § 333.

4. Id., § 334; 2 Chamberlayne on Evidence, § 1228 *et seq.*

SUBSECTION I.

Presumption against Ignorance of the Law.

The law presumes conclusively against ignorance of its provisions. It is a *praesumptio juris et de jure,* that all persons, even foreigners, subject to any law which has been duly promulgated, or which derives its efficacy from general or immemorial custom, must be supposed to be acquainted with its provisions, so far as to render them amenable to punishment for their violation, and to have done all acts with a knowledge of their legal effects and consequences. "Ignorantia juris, quod quisque tenetur scire, non excusat."[5]

Courts of justice are also presumed to know the law, but in a different sense. Private individuals are only taken to know it sufficiently for their personal guidance; but tribunals are to be deemed acquainted with it, so as to be able to administer justice when called on: for which reason it is not necessary, in pleading, to state matter of law.[6]

The sovereign is also presumed to be acquainted with the law,[7]—"Praesumitur rex habere omnia jura in scrinio pectoris sui": still it is competent, in certain cases, to show that grants from the Crown have been made under a mistake of the law.[8]

SUBSECTION II.

Presumptions derived from the Course of Nature.

Presumptions derived from the course of nature are in general entitled to more weight than such presumptions as arise casually, and they may be divided into physical and moral. As instances of the first, the law notices the course of the heavenly bodies, the changes of the seasons, and other physical phenomena.[9] So the law presumes all in-

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5. Broom's Leg. Max., *331; 2 Chamberlayne on Evidence, § 1227.

6. See Pleading; Chamberlayne's Best's Evidence, §§ 253, note, 337.

7. Co. Litt., 99a.

8. Rex v. Clarke, 1 Freem. 172.

9. 1 Chamberlayne on Evidence, § 703 *et seq.*

dividuals to be possessed of the usual powers and faculties of the human race; such as common understanding, the power of procreation within the usual ages, etc.

Under this head come the important and difficult questions of the **maximum and minimum term of gestation** of the human foetus. These are medico-legal subjects, on which, where we are not tied up by any positive rule of law, the opinions of physiologists and physicians must necessarily have great weight.[1]

Presumptions of this kind, derived from observation of the moral world. Many of these are founded on the feelings and emotions natural to the human heart, of which we have already seen an instance in the celebrated judgment of Solomon. Thus, it is held that money advanced by a parent to his child is intended as a gift, not as a loan, etc.[2]

It is also a maxim running through the whole law, that **every person must be taken to intend the natural consequences of his acts.** The principal applications of this maxim are to be found in criminal cases.[3]

SUBSECTION III.

Presumptions against Misconduct.

1. It is a *praesumptio juris,* running through the whole law of England, that **no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law,**— whether *malum in se* or *malum prohibitum,*— or to have done any act subjecting him to any species of punishment, such, for instance, as a contempt of court; or involving a penalty, such as loss of dower, etc. And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offence, or of dealing with the supposed conduct; but it holds in all proceedings, for whatever purpose originated, and whether

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1. See Ewell's Medical Jurisprudence (2d Ed.), p. 190 *et seq.*, as to the maximum and minimum terms of gestation.

2. Chamberlayne's Best's Evidence, §§ 341-343.

3. Id., 344; Wash. Cr. Law (3d Ed.), 7.

the guilt of the party comes in question directly or collaterally. **It is therefore a settled rule in criminal cases, that the accused must be presumed to be innocent until proved to be guilty**; and consequently, that the onus of proving everything essential to the establishment of the charge against him lies on the prosecutor.[4] **It is, however, in general sufficient to prove a prima facie case.**

It is a branch of this rule, that **ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning.**

2. **All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law.**[5] Thus, the judgment of courts of competent jurisdiction are presumed to be well founded, and their records to be correctly made; judges and jurors are presumed to do nothing causelessly or maliciously.

3. It is a principle of law nearly, if not altogether, as universal as the former, that "**Odiosa et inhonesta non sunt in lege praesumenda.**"[6] In futherance of this, it is a maxim that fraud and covin are never presumed, even in third parties whose conduct only comes in question collaterally. So, the law presumes against vice and immorality; and, on this ground, presumes strongly in favor of marriage.

One of the strongest illustrations of this principle (although resting also in some degree on grounds of public policy) is the presumption in favor of the legitimacy of children.[7]

4. **Wrongful or tortious conduct will not be presumed.** Thus, no species of ouster, such as disseisin, discontinuance, etc., will be presumed without proof, either direct or presumptive.[8]

5. **Want of religious belief, or irreligious conduct, will not be presumed.** "All the members of a Christian community being presumed to entertain the common faith, no

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4. 2 Chamberlayne on Evidence, §§ 1228, 1229 and cases cited; Chamberlayne's Best's Evidence, § 346 *et seq.*

5. Id.

6. Odious and dishonest things are not to be presumed by the law.

7. Chamberlayne's Best's Evidence, § 349 and cases cited.

8. Id., § 351.

man is supposed to disbelieve the existence and moral government of God.[9]

6. **All testimony given in a court of justice is presumed to be true until the contrary appears.**[1]

SUBSECTION IV.

Presumptions in Favor of the Validity of Acts.

The important maxims, "Omnia praesumuntur rite esse acta," "Omnia praesumuntur solenniter esse acta,"[2] **"Omnia praesumuntur legitime facta, donec probetur in contrarium," etc., must not be understood as of universal application.** The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed. **The true principle** intended to be conveyed by the rule, "Omnia praesumuntur rite esse acta," and the other expressions just quoted, seems to be, that **there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative;** and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy.

Taking a general view of the subject, the acts or things thus presumed are divisible into **three classes:** 1. **Where from the existence of posterior acts in a supposed chain of events the existence of prior acts in the chain is inferred or assumed,** — as where a prescriptive right, or a grant, is inferred from modern enjoyment. 2. **Where the existence of posterior acts is inferred from that of prior acts,** — as where the sealing and delivery of a deed purporting to be

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9. Id., § 351.

1. Id., § 352.

2. All acts are presumed to have been rightly and regularly done. Broom's Leg. Max., *847. See 2 Chamberlayne on Evidence, § 1049; Chamberlayne's Best's Evidence, § 353 *et seq.* and cases cited.

signed, sealed, and delivered, are inferred on proof of the signing only. This is manifestly the reverse of the former, and, as a general rule, the presumption is much weaker. 3. **Where intermediate proceedings are presumed,** — as where livery of seisin is presumed, on proof of a feoffment and twenty years' enjoyment under it.

This principle will be considered: —

1. **With respect to official appointments. It is a general principle, that a person's acting in a public capacity is prima facie evidence of his having been duly authorized so to do.**[3] And the principle holds in criminal cases as well as in civil.

This presumption is not restricted to appointments of a strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act. But it does not, at least in general, hold in the case of private individuals, or agents supposed to be acting by their authority. Thus, it does not apply to an executor or administrator.

2. **The maxim, "Omnia praesumuntur rite esse acta," holds in many cases where acts are required to be done by official persons, or with their concurrence.**[4]

3. **With respect to judicial acts** the maxim, "Ommia praesumuntur rite esse acta," has here a much more limited application. "With respect to the general principle of presuming a regularity of procedure, it may perhaps appear to be the true conclusion, that, wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity. This principle, however, ought not to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists." It is a principle that irregularity will not be presumed, and there are several instances to be found in the books of the

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3. Wadington v. Roberts, L. R. 3 Q. B. 579; Chamberlayne's Best's Evidence, § 359.

4. Id.

courts dispensing with formal proof of things necessary, in strictness, to give validity to judicial acts.

The maxim, "Omnia praesumuntur rite esse acta," does not apply to give jurisdiction to magistrates, or other inferior tribunals.[5]

4. As to the application of this maxim to **extra-judicial acts**, such as written instruments, and matters *in pais*, it is an established rule, that **deeds, wills, and other attested documents, which are thirty years old or upwards, and are produced from an unsuspected repository, prove themselves**; although it is still competent to the opposite party to call witnesses to disprove the regularity of the execution. And there are many instances of the application of this presumption, even where it is strictly necessary to prove the execution of an attested instrument. Thus, where a deed is produced, purporting to have been executed in due form by signing, sealing, and delivery, but the attesting witnesses can only speak to the fact of signing, it may be properly left to the jury to presume a sealing and delivery.[6]

So, **collateral facts** requisite to give validity to instruments will, in general, be presumed.

This principle has also been extended to **the construction of instruments.** Thus, where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties.[7]

SUBSECTION V.

Presumptions from Possession and User.

By the law of England, possession, or quasi possession, as the case may be, is prima facie evidence of property, — "Melior (potior) est conditio possidentis;"[8] and the possession of real estate, or the reception of the rents and

5. Chamberlayne's Best's Evidence, §§ 360, 361 and notes. See *ante*, this volume, Jurisdiction, Courts.

6. Burling v. Paterson, 9 C. & P. 570; Chamberlayne's Best's Evidence, § 362; 2 Chamberlayne on Evidence, §§ 1195, 1196.

7. Chamberlayne's Best's Evidence, § 364.

8. Better is the condition of the defendant.

profits from the person in possession, is *prima facie* evidence of the highest estate in that property, namely, a seisin in fee. But the strength of the presumption arising from possession of any kind is materially increased by the length of the time of enjoyment, and the absence of interruption or disturbance from others, who, supposing it illegal, were interested in putting an end to it. The rule is, that, where the facts show the long-continued exercise of a right, the court is bound to presume a legal origin, if such be possible, in favor of the right.

1. Among the various ways in which a title to property can be acquired, most systems of jurisprudence recognize that of "**prescription,**" or undisturbed possession or user for a period of time, longer or shorter as fixed by law. According to the common law of England, this species of title cannot be made to land or corporeal hereditaments, or to such incorporeal rights as must arise by matter of record; and it is in general **restricted to things which may be created by grant**, such as rights of common, easements, franchises which can be created by grant without record, etc.

At the common law, every prescription must have been laid in the tenant of the fee simple; and parties holding any inferior interest in the land could not prescribe, by reason of the imbecility of their estates; but were obliged to prescribe under cover of the tenant in fee, by alleging his immemorial right to the subject-matter of the claim, and deducting their own title from him.

A prescriptive or customary right, in order to be valid, must have existed undisturbed from time immemorial; by which, at the common law, was meant, as the words imply, that no evidence, verbal or written, could be adduced of any time when the right was not in existence. By an equitable construction of the statute West. 1 (3 Edw. I.), c. 39, a period of *legal* memory was established — in contradistinction to that of *living* memory — by which every presumptive claim was deemed indefeasible, if it had existed from the first day of the reign of Richard I. (A. D. 1189); and, on

the other hand, to be at once at an end if shown to have had its commencement since that period.

After the time of limitation had been further reduced to sixty years by 32 Hen. VIII., c. 2, and in many cases, including the action of ejectment, to twenty years by 21 Jac. I., c. 16, it might have been expected that, by a similar equitable construction, the time of prescription would have been proportionably shortened. This, however, was not done, and it remained as before. But the Stat. 32 Hen. VIII., c. 2, affected the subject in this way, that whereas, previously, a man might have prescribed for a right, the enjoyment of which had been suspended for an indefinite number of years, it was thereby enacted that no person should make any prescription by the seisin or possession of his ancestors or predecessors, unless such seisin or possession had been within sixty years next before such prescription made.[9]

A prescriptive title once acquired may be destroyed by interruption. But this must be understood to be an **interruption of the right,** not simply an interruption of the user. Thus, a prescriptive right may be lost or extinguished by a unity of possession of the right with an estate in the land as high and perdurable as that in the subject-matter of the right.

The time of prescription thus remaining unaltered, it is obvious that, if strict proof were required of the exercise of the supposed right up to the time of Richard I., the difficulty of establishing a prescriptive claim must have increased with each successive generation. The mischief was, however, considerably lessened by the rules of evidence established by the courts. **Modern possession and user being prima facie evidence of property and right, the judges attached to them an artificial weight,** and held that, when uninterrupted, uncontradicted, and unexplained, they constituted proof from which a jury ought to infer a prescriptive right, coeval with the time of legal memory.

The length of possession and user necessary for this purpose depends in some degree on circumstances and the

9. Consult the local statutes of limitation on this subject.

nature of the right claimed. Generally, in the case of things to which a title may be made by prescription, proof of enjoyment as far back as living memory raises a presumption of enjoyment from the remote era. And a like presumption may be made from an uninterrupted enjoyment for a considerable number of years.

Where there is general evidence of a prescriptive claim extending over a long time, the presumption of a right existing from time immemorial will not be defeated by proof of slight, partial, or occasional variations in the exercise or extent of the right claimed.

Although the user is not sufficiently long or uniform to raise the presumption of a prescriptive right, still it is entitled to its legitimate weight as evidence, from which, coupled with other circumstances, the jury may find the existence of the right.

The presumption of prescriptive right derived from enjoyment, however ancient, is instantly put an end to when the right is shown to have originated within the period of legal memory;[1] and it is of course liable to be rebutted by any species of legitimate evidence, direct or presumptive; or even by the nature of the alleged right itself, which may make it impossible that it should have existed from the time of Richard I.

Notwithstanding the desire of the courts to uphold prescriptive rights, there were many cases in which the extreme length of the time of legal memory exercised a very mischievous effect; as the presumption from user, however strong, was liable to be altogether defeated by showing the origin of the claim at any time since the 1 Richard I. (A. D. 1189). Besides, possession and user are in themselves legitimate evidence of the existence of rights created since that period, the more obvious and natural proofs of which may have perished by time or accident. "*Tempus,*" says Sir Edward Coke, "*est edax rerum;*"[2] and records and letters patent, and other writings, either consume, or are lost, or embezzled; and God forbid that ancient grants and acts should be drawn in question, although they cannot be

1. See local statutes of limitation.

2. Time is the devourer of things.

shown, which, at the first, was necessary to the perfection of the thing." Acting partly on this principle, but chiefly for the furtherance of justice and the sake of peace, by quieting possession, **the judges attached an artificial weight to the possession and user of such matters as lie in grant, where no prescriptive claim was put forward; and in process of time they established it as a rule, that twenty years' adverse and uninterrupted enjoyment of an incorporeal hereditament, uncontradicted and unexplained, was cogent evidence from which the jury should be directed conclusively to presume a grant, or other lawful origin of the possession.** This period of twenty years seems to have been adopted by analogy to the Statute of Limitations, 21 Jac. I., c. 16, which makes an adverse enjoyment for twenty years a bar to an action of ejectment. For, as an adverse possession of that duration gave a possessory title to the land itself, it seemed reasonable that it should afford a presumption of right to a minor interest arising out of the land. The practical effect of this *quasi praesumptio juris*[3] was considerably increased by the decision in Read v. Brookman;[4] namely, that it was competent to plead a right to an incorporeal hereditament by deed, and excuse profert of the deed by alleging it to have been lost by time and accident. It became, therefore, a usual mode of claiming title to an incorporeal hereditament, to allege a feigned grant, within the time of legal memory, from some owner of the land or other person capable of making such grant, to some tenant or person capable of receiving it, setting forth the names of the supposed parties to the document, with the excuse for profert that the document had been lost by time and accident. On a traverse of the grant, proof of uninterrupted enjoyment for twenty years was held cogent evidence of its existence; and this was termed **making title by "non-existing grant."** "The presumption of right in such cases," says Mr. Starkie, "is not conclusive; in other words, it is not an inference of mere law, to be made by the courts; yet it is an inference which the courts advise juries

3. As it were, presumption of law. 4. 3 T. R. 151.

to make, wherever the presumption stands unrebutted by contrary evidence."

In order, however, to raise this presumption against the owner of the inheritance, the possession must be with his acquiescence; and such a possession with the acquiescence of a tenant for life, or other inferior interest in the land, although evidence against the owner of the particular estate, will not bind the fee. But the acquiescence of the owner of the inheritance may either be proved directly, or inferred from circumstances.

This presumption only obtains its practically conclusive character, when the evidence of enjoyment during the required period remains uncontradicted and unexplained.[5]

2. We proceed, in the second place, to consider the presumptions made from user, in cases of incorporeal rights not coming within the statutes above referred to. Among the foremost of these may be ranked **the presumption of the dedication of highways** to the public. "A road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public." And such dedication may be either general or limited,— e. g., the owner of the soil may dedicate a footway to the public, subject to his right of periodically ploughing it up. The fact of dedication may either be proved directly, or inferred from circumstances, especially from that of permissive user on the part of the public. **If a man opens his land so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way, unless some act be done by the owner to show that he had intended only to give a license to pass over the land, and not to dedicate a right of way to the public.** Among acts of this kind may be reckoned the putting up a bar, or excluding by positive prohibition persons from passing. The common course is by shutting up the passage for one day in each year. Where no acts of this

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5. See the statutes 2 & 3 Will. IV., c. 71 and 100, shortening the time of prescription in certain cases and the local statutes of limitation. See, also, 2 Chamberlayne on Evidence, §§ 1163a, 1163b; Chamberlayne's Best's Evidence, Book 3, pt. 2, subsec. 5, § 366 *et seq.* and cases cited.

nature have been done, **there is no fixed rule as to the length of user, which is sufficient, when unaccompanied by other circumstances, to constitute presumptive evidence of a dedication**; but unquestionably a much shorter time will suffice than is required to raise the presumption of a grant among private individuals. But the animus or intention of the owner of the soil in doing the act, or permitting the passage, must be taken into consideration. "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that **there must be an intention to dedicate**, — there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." But the dedication of a highway to the public must be the act, or at least with the consent, of the owner of the fee; the act or assent of a tenant for any less interest will not suffice, although the assent of the owner of the inheritance may be inferred from circumstances.

The presumption of the surrender or extinguishment of incorporeal rights by non-user. This is altogether unaffected by the prescription acts. The result of the cases seems to be that the non-user of a privilege or easement is **merely evidence of abandonment**; and that the question of abandonment is one of fact, which must be determined on the whole of the circumstances of each particular case.

Easements are divided into continuous and intermittent, — the former being those of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as water-spouts, the right to air, light, etc.; and the latter being those of an opposite description, such as rights of way, etc. **With respect to continuous easements**, the correct inference from the cases seems to be, that **there is no time fixed by law during which the cessation of enjoyment must continue, in order to raise the presumption of an abandonment**; but it is for the jury to take all the circumstances of the case into their consideration, in order to see if there has been an intention to renounce the right.

With respect to easements of the intermittent kind, it seems clear that mere intermittence of the user, or slight alterations in the mode of enjoyment, will not be sufficient to destroy the right, when circumstances do not show any intention of relinquishing it; whilst, on the other hand, a much shorter period than twenty years, when it is accompanied by circumstances such as disclaimer, or other indication of intention to abandon the right, will be sufficient to raise the presumption of extinguishment.[7]

Licenses may be presumed; and, as a general rule, from a much shorter period of enjoyment than twenty years.[8]

3. **Presumptions of fact in support of beneficial enjoyment. The general principle governing the subject** is thus stated by Tindal, C. J.: "No case can be put in which any presumption" (*semble,* any artificial presumption) "has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed."

There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Matters of record generally, and even acts of Parliament, at least very ancient ones, will thus be presumed; as also will grants from the Crown, letters patent, writs of *ad quod damnum* and inquisitions thereon, by-laws of corporations, fines and recoveries, etc.[9]

SUBSECTION VI.

Presumptions from the Ordinary Conduct of Mankind, the Habits of Society, and the Usages of Trade.

The presumptions drawn from the ordinary conduct of mankind, the habits of society, and the usages of trade, are

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7. See, generally, Chamberlayne's Best's Evidence, Book 3, pt. 2, subsec. 5, and authorities cited.

8. Doe *ex dem* Foley v. Wilson, 11 East, 56; Thompson v. Carr, 5 N. H. 510.

9. Chamberlayne's Best's Evidence, § 393; Nixon v. Car Co., 28 Miss. 431.

numerous; and several of them come under the head of **presumptions of law.** The occupation of land carries with it an implied agreement, on the part of the tenant, to manage the land according to the course of good husbandry and the custom of the country. A promise to marry generally is interpreted as a promise to marry within a reasonable time; and, on proof of a regular marriage *per verba de praesenti,*[1] consummation is implied. The cancelling or taking the seals off a deed, or tearing a will in pieces, is *prima facie* evidence of revocation.[2]

It may be stated as a general rule, that, **prima facie, documents should be taken to have been made or written on the day they bear date.** This has been held to apply to letters, bills of exchange, and promissory notes, and the indorsements on them, and also to banker's checks.[3]

Many presumptions are drawn from the usual course of business in public offices. With regard to the course of the post, it was in several early cases ruled that, if a letter is put into a post-office, that is *prima facie* proof, until the contrary appears, that the party to whom it is addressed received it in due course.[4] Presumptions of this kind are also made from the **course of business in private offices**; such as those of merchants, solicitors, etc.

There are several other presumptions drawn from the **usages of trade.** Thus, where a partnership is found to exist between two persons, but there is no evidence to show in what proportions they are interested, it is presumed that they are interested in equal moieties.[5] So, bills of exchange and promissory notes are presumed to have been given for consideration.

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1. By words of the present.

2. See, generally, Chamberlayne's Best's Evidence, § 400 *et seq.*

3. Anderson v. Weston, 6 Bing. N. C. 296; Laws v. Rand, 3 C. B. N. S. 442.

4. Stockton v. Collin, 7 M. & W. 515. The American cases will be found collected in 2 Chamberlayne on Evidence, § 1057, notes.

5. See *post*, Partnership.

SUBSECTION VII.

Presumption of the Continuance of Things in the State in which they have once existed.

It is a very general presumption, that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence, either direct or circumstantial. Thus, where seisin of an estate has been shown, its continuance will be presumed; as also will that of a parochial settlement, of the authority of an agent, etc. So, although the law in general presumes against insanity, yet, where the fact of insanity has been shown, its continuance will be presumed; and the proof of a subsequent lucid interval lies on the party who asserts it.[6]

There are two particular cases which will require special consideration: namely, **the presumption of the continuance of debts,** obligations, etc., until discharged or otherwise extinguished; and **the presumption of the continuance of human life.** With respect to the former of these, **a debt once proved to have existed is presumed to continue, unless payment, or some other discharge, be either proved or established by circumstances.** A receipt under hand and seal is the strongest evidence of payment, for it amounts to an estoppel, conclusive on the party making it; but a receipt under hand alone, or a verbal admission of payment, is in general only *prima facie* evidence of it, and may be rebutted. The fact of payment may be presumed from any other circumstance which renders that fact probable; as, for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it.[7]

Presumptions respecting the continuance of human life. There is certainly, in the English law, no praesumptio juris relative to the continuance of life, in the abstract. The death of any party once shown to have been alive is matter of fact to be determined by a jury; and as the presumption

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6. See, generally, Chamberlayne's Best's Evidence, § 405 *et seq.*

7. See Chamberlayne's Best's Evidence, § 406.

is in favor of the continuance of life, the onus of proving the death lies on the party who asserts it.

The fact of death may, however, be proved by presumptive, as well as by direct evidence. When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of. And the same rule holds, generally, with respect to persons who are absent from their usual places of resort, and of whom no account can be given. This is a mixed presumption, said to have been adopted by analogy to the statutes 1 Jac. I., c. 11, s. 2, and 19 Car. II., c. 6, s. 2.[8]

But where a party has been absent for seven years, without having been heard of, the only presumption arising is that he is dead; there is none as to the time of his death. And if it be sought to establish the precise time of such person's death, this must be done affirmatively, by evidence of some sort beyond the mere fact that seven years have elapsed since such person was last heard of.[9]

No presumption of survivorship. Where several persons, generally of the same family, have perished by a common calamity, such as shipwreck, earthquake, conflagration, railway accident, or battle, and where the priority in point of time of the death of one over the rest exercises an influence on the rights of third parties, the English law recognizes no artificial presumption, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight, i. e., as a circumstance proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof.[1]

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8. Id., § 408; Ewell's Med. Jur. (2d Ed.) 272, 273.

9. Id. See, also, 2 Chamberlayne on Evidence, § 1239; Ruloff v. People, 18 N. Y. 179.

1. See Ewell's Med. Jur. (2d Ed.) 273; 2 Chamberlayne on Evidence, § 1177 and cases cited.

SUBSECTION VIII.

Presumptions in Disfavor of a Spoliator.

Another very important maxim is, "Omnia praesumuntur contra spoliatorem," or "Omnia praesumuntur in odium spoliatoris,"[2] a maxim resting partly on natural equity, but much strengthened by the artificial policy of law. **The leading case** on this subject is that of **Armory v. Delamirie,**[3] where a person in a humble station of life, having found a jewel, took it to the shop of a goldsmith to inquire its value, who, having got the jewel into his possession under pretence of weighing it, took out the stones, and, on the finder refusing to accept a small sum for it, returned to him the empty socket. An action of trover having been brought, to recover damages for the detention of the stones, the jury were directed that, unless the defendant produced the jewel and thereby showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels that would fit the socket the measure of their damages.

But the most usual application of this principle is where there has been any forensic malpractice, — **by eloigning, suppressing, defacing, destroying, or fabricating documents,** or other instruments of evidence, or introducing into legal proceedings any species of the *crimen falsi*. This not only raises a presumption that the documents or evidence eloigned, suppressed, etc., would, if produced, militate against the party eloigning, suppressing, etc., but procures more ready admission to the evidence of the opposite side. "If," says Lord Chief Justice Holt, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply it." This rule is evidently based on the principle, that no one shall be allowed to take advantage of his own wrong.

It is said that the presumption against the spoliator of documents is not confined to assuming those documents to be of a nature hostile to him, and procuring a more favor-

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2. Everything is to be presumed against a spoliator.

3. 1 Stra. 505; 1 Sm. L. C. *470. Cases fully collected in the notes.

able reception for the evidence of his opponent; but that it has **the further effect of casting suspicion on all the other evidence adduced by the party guilty of the malpractice.**

The presumption arising from the fabrication or corruption of instruments of evidence is even stronger than that arising from the suppression or destruction of them.

However salutary, and in general equitable, the maxim, "Omnia praesumuntur contra spoliatorem," must be acknowledged to be, it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far.

Whatever weight may be legitimately attached to this presumption in civil cases, great care must be taken in criminal cases, where life or liberty is at stake, not to give to spoliation, or similar acts, any weight to which they are not entitled.[4]

SUBSECTION IX.

Presumptions in International Law.

The public international law is adopted by the common law, and is held to be part of the law of the land.[5]

Where the subject of one state is also the independent sovereign of another, he is, of course, not responsible to the laws of the former state for acts done by him as such sovereign. And it seems that, in respect to any act done by such a person out of the realm of which he is a subject, or any act as to which it might be doubtful whether it ought to be attributed to the character of the sovereign prince or to that of the subject, the act ought to be presumed to have been done in the character of the sovereign prince.[6]

The principle of presuming in disfavor of a spoliator is recognized in international law, especially in those cases where papers have been spoliated by a captured party,[7] and

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4. See, generally, 2 Chamberlayne on Evidence, § 1070 *et seq.* and note.

5. Chamberlayne's Best's Evidence, § 417; 1 Chamberlayne on Evidence, § 591; 4 Bl. Com. *67 (*ante*, vol. 1).

6. The Duke of Brunswick v. The King of Hanover, 6 Beav. 58; Chamberlayne's Best's Evidence, § 418.

7. Id., § 419; The Pizarro, 2 Wheat. 242 n. (e).

where neutral vessels are found carrying despatches from one part of the dominions of a belligerent power to another.

With respect to **private international law**, its very existence rests on one important presumption. "In the silence of any positive rule," says Dr. Story, "affirming, or denying, or restraining the **operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests.**" "A spirit of comity, and a disposition to friendly intercourse, are presumed to exist among nations as well as among individuals."[8]

The place of a person's birth is considered as his domicil, if it is at the time of his birth the domicil of his parents. But a more imporant rule is, that **the place where a person lives must be taken, prima facie, to be his domicil,** until other facts establish the contrary. Where the family of a married man resides is generally to be deemed his domicil, and that of an unmarried man will be taken to be in the place where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges. And it is said to be a principle, that, where the place of domicil is fixed or determined by positive facts, presumptions from mere circumstances will not prevail against those facts.[9]

Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for in the latter case the law of the place of performance is to govern, because such may well be presumed to have been the intention of the parties.[1] So, a foreign marriage will be presumed to have been celebrated with the solemnities required by the law of the place where it is celebrated.[2] And the general presumptions against crime, fraud, covin, immorality, etc., are applicable to acts done abroad.

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8. Story's Confl. Laws (5th Ed.), § 38.

9. Chamberlayne's Best's Evidence, § 421 and cases cited.

1. Story's Confl. Laws, § 242; Robinson v. Bland, 1 W. Bl. 256, 258, 259, per Lord Mansfield.

2. 10 East, 289.

SUBSECTION X.

Presumptions in Maritime Law.

AMONG the most important presumptions in maritime law are those relating to **seaworthiness.**

Every ship insured on a voyage policy sails under an implied warranty that she is seaworthy.[3] It is not necessary to inquire whether the assured acted honestly and fairly in the transaction; however just and honest his intentions may have been, if he was mistaken in the fact, and the vessel was not seaworthy, the underwriter is not liable. But if a ship, shortly after sailing, turns out to be unfit for sea, without apparent or adequate cause, the burden of proof is thrown on the assured;[4] and a jury ought to presume that the unseaworthiness existed before the commencement of the voyage. And this rule holds even though the ship encountered a violent storm, unless it can fairly be inferred that the damage resulted from the storm. The implied warranty of seaworthiness, however, does not extend to time policies.

Where a vessel is missing, and no intelligence of her has been received within a reasonable time after she sailed, it is to be presumed that she foundered at sea. There is no precise time for this presumption fixed, either by the common or general matritime law, although the laws of some countries have peculiar provisions on the subject; but the court and jury will be guided by the circumstances laid before them, and the nature of the voyage and navigation. In order, however, to raise this presumption, it must be distinctly shown that the ship left port, bound on her intended voyage.

SUBSECTION XI.

Miscellaneous Presumptions.

A large number of these presumptions relate to real es-

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3. Chamberlayne's Best's Evidence, § 423 and notes.

4. As to expert evidence as to seaworthiness, see 3 Chamberlayne on Evidence, § 2400.

5. Chamberlayne's Best's Evidence, § 424.

tate, and are for the most part *quasi praesumptiones juris,*[6] i. e., presumptions which are almost as obligatory as presumptions of law, but which cannot be made without the intervention of a jury. Thus, the soil of the sea-shore, between high and low water mark, is presumed to belong to the Crown; and so is the soil at the bottom of a nevigable tidal river.[7] Where a river is not navigable, the bed is presumed to be the property of the owners on each side, *ad medium filum aquae.* The same principle holds in the case of a public highway,— the soil of which is taken, *prima facie,* to belong to the owners of the adjoining lands, *usque ad medium filum viae,* and it also applies to the case of a private road. Strips of land adjoining a road are presumed to belong to the owner of the adjoining enclosed land, and not to the lord of the manor. In the case of party-walls, where the quantity of land contributed by each owner is unknown, the common use of the wall is *prima facie* evidence that it and the land on which it is built are the undivided property of both.[8]

Several presumptions are founded on the relations in which parties stand to each other. Thus, a woman who commits felony, or perhaps misdemeanor, in company with her husband, is excused, on the presumption (which however may be rebutted) of her having acted under his coercion.[9]

In the case of contracts between individuals, there are many presumptions of law based on policy and general convenience. Thus, it is a conclusive presumption of law, that an instrument under seal has been given for consideration; and this presumption can only be removed by impeaching the instrument for fraud. So, although in the case of contracts not under seal a consideration is not in general presumed, it is otherwise in the case of bills of exchange and promissory notes.[1]

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6. As it were presumptions of law.

7. See vol. 1 (Blackstone); Chamberlayne's Best's Evidence, § 426 and note, p. 383.

8. Chamberlayne's Best's Evidence, § 426 and cases cited.

9. See vol. 1 (Blackstone), Criminal Law.

1. See *ante,* Contracts.

Where goods intrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the Queen's enemies, it is a praesumptio juris et de jure that they were lost by negligence, fraud, or connivance on his part. By the act of God is meant storms, lightning, floods, earthquakes, and such direct, violent, sudden, and irresistible act of nature as could not by any reasonable care have been foreseen or resisted; and under the head of the Queen's enemies must be understood public enemies, with whom the nation is at open war,[2] so that robbery by a mob, irresistible from their number, would be no excuse for the bailee.

So, in the case of innkeepers, before the 26 & 27 Vict., c. 41,— which has considerably modified their liability,— **where the goods of a traveler brought into an inn were lost, it was presumed to be through negligence in the innkeeper;** and the law cast on him the onus of rebutting this presumption.[3]

SECTION III.

Presumptions and Presumptive Evidence in Criminal Law.

SUBSECTION I.

Presumptions in Criminal Law.

Not only are the general presumptions of law recognized in criminal jurisprudence, but it has peculiar presumptions of its own. The universal presumption of acquaintance with the penal law, and the maxim, "Res judicata pro veritate accipitur,"[4] exists there in full force. Ignorance of any law which has been duly promulgated cannot be pleaded in a criminal court; and a person who has once been tried for an offence, under circumstances where his safety was in jeopardy by the proceedings, cannot, if acquitted, be tried again for that offence.[5]

A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation.

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2. Chamberlayne's Best's Evidence, § 430 and notes; vol. 1 (Blackstone), Common Carriers; Torts.

3. Id.

4. Matters adjudged are taken as true.

5. See Wash. Cr. Law (3d Ed.), 193, 195.

When, for instance, a party is proved to have laid poison for another, or to have deliberately struck at him with a deadly weapon, or to have knowingly discharged loaded fire-arms at him, it would be absurd to require the prosecutor to show that he intended death or bodily harm to that person. So, where a party deliberately publishes defamatory matter, malice will be presumed.[6]

A criminal intent is sometimes transferred by law from one act to another, the maxim being, "In criminalibus sufficit generalis malitia intentionis cum facto paris gradu."[7] A., maliciously discharging a gun at B., kills C.; A. is guilty of murder, for the malice is transferred from B. to C.[8]

In some cases the law goes further, and attaches to acts criminal in themselves a degree of guilt higher than that to which they are naturally entitled. Thus, if a man, without justification, assaults another with the intention of giving him only a slight beating, and death ensues, he is held to be guilty of homicide. And if several persons go out with the intention of committing a felony, and in the prosecution of the general design one of them commits any other felony, all are accountable for it.[9]

Some presumptions of the criminal law are for the protection of accused persons. Thus, an infant under seven years of age is conclusively presumed incapable of committing felony; between the ages of seven and fourteen the presumption exists, but may be rebutted by evidence; and a boy under fourteen is conclusively presumed incapable of committing a rape as principal in the first degree.[1]

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6. Malice is the wilful doing of an injurious act without a lawful excuse. Wash. Cr. Law (3d Ed.), 68 and notes; Chamberlayne's Best's Evidence, § 433.

7. In criminals a general malicious intention is sufficient when accompanied by a fact of equal degree. Bacon's Max. Law, Reg. 15; Chamberlayne's Best's Evidence, § 434.

8. Id.

9. 1 Hale P. C. 439; Chamberlayne's Best's Evidence, § 435.

1. Wash. Cr. Law (3d Ed.), 19; vol. 1 (Black. Com.), Criminal Law, 4th book.

SUBSECTION II.

Presumptive Proof in Criminal Cases generally.

The rules regulaing the admissibility of evidence are, in general, the same in civil as in criminal proceedings; and although presumptive evidence is receivable to prove almost any fact, the necessity for resorting to it is more frequent in the latter than in the former.

Numerous rules have from time to time been suggested for the guidance of tribunals in determining the degree of the credibility of evidence, among which the following are the soundest in principle, and most generally recognized in practice: —

1. **The onus of proving everything essential to the establishment of the charge against the accused, lies on the prosecutor.**

2. **The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.**

3. **In matters of doubt it is safer to acquit than to condemn**; for it is better that several guilty persons should escape, than that one innocent person should suffer.[2]

The above hold universally; but there are two others peculiarly applicable when the proof is presumptive: —

1. **There must be clear and unequivocal proof of the corpus delicti.**[3]

Where, however, the fact of a murder is proved by eye-witnesses, the inspection of the dead body may be dispensed with.[4]

The basis of a corpus delicti once established, presumptive evidence is receivable to complete the proof of it; as, for instance, to fix the place of the commission of the offence,— the *locus delicti;* and even to show the presence of crime, by negativing the hypotheses that the facts proved

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2. See, generally, as to the above rules, Chamberlayne's Best's Evidence, § 440 and cases cited.

3. 2 Chamberlayne on Evidence, § 958 and cases cited. But it may be established by circumstantial evidence. Chamberlayne's Best's Evidence, § 441 and notes.

4. Rex v. Hindmarsh, 2 Leach C. L. 569, 571.

were the result of natural causes, or irresponsible agency. For this purpose all the circumstances of the case, and every part of the conduct of the accused, may be taken into consideration. On finding a dead body, for instance, it should be considered whether death may not have been caused by lightning, cold, noxious exhalations, etc., or have been the result of suicide.[5]

Whatever may be the admissibility or effect of presumptive evidence to prove the corpus delicti, it is always admissible, and it is often, especially when amounting to evidentia rei, most powerful to disprove it. Thus, the probability of the statements of witnesses may be tested by comparing their story with the surrounding circumstances; and in practice false testimony is often encountered and overthrown in this way.[6]

2. **The hypothesis of delinquency should be consistent with all the facts proved.**[7] It should never be forgotten, that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist; an inevitable consequence of which is, that if any of the circumstances established in evidence are absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true.

SUBSECTION III.

Inculpatory Presumptive Evidence in Criminal Proceedings.

I. **Motives to commit the offence, and means and opportunities of committing it.**— The mere fact of a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it. Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof; as where a person accused of having set fire to his house has previously insured it to an amount exceeding its value. On

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5. Id.

6. Chamberlayne's Best's Evidence, § 450; 1 Hale P. C. 635.

7. Chamberlayne's Best's Evidence, § 451; 1 Stark's Ev. (4th Ed.), 842, 859.

the other hand, the absence of any apparent motive is always a fact in favor of the accused; although the existence of motives invisible to all except the person who is influenced by them must not be overlooked.[8]

The infirmative hypotheses affecting motives to commit an offence are applicable, also, to means and opportunities of committing it.[9]

II. **Preparations for the commission of an offence, and previous attempts to commit it.**— Under the head of preparations for the commission of an offence may be ranked the purchasing, collecting, or fashioning instruments of mischief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstructions to its execution, or averting suspicion from the criminal. Besides preparations of this nature, which are immediately pointed to the accomplishment of the principal design, there are others of a secondary nature, for preventing discovery or averting suspicion of the former. In addition to these preparations of the second order may be imagined preparations of the third and fourth orders, and so on.[1]

The probative force, both of preparations and previous attempts, manifestly rests on the presumption, that an intention to commit the individual offence was formed in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. But, however strong this presumption may be when the *corpus delicti* has been proved, it must be taken in connection with the following **infirmative hypotheses.**

1st. **The intention of the accused** in doing the suspicious act is a psychological question and may be mistaken. His intention may either have been altogether innocent, or, if criminal, directed towards a different object.

2d. But even when preparations have been made with the intention of committing, or previous attempts have been made to commit, the identical offence charged, two things

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8. Chamberlayne's Best's Evidence, § 453.

9. Id.

1. Chamberlayne's Best's Evidence, §§ 454-457.

remain to be considered: 1. The intention may have been changed or abandoned before execution. Until a deed is done there is always a *locus paenitentiae.*[2] 2. The intention to commit the crime may have persisted throughout, but the criminal may have been anticipated by others.[3]

III. **Declarations of intention to commit an offence, and threats to commit it.**— Most of the infirmative hypotheses applicable to the former are incident to those now under consideration; and these, besides, have some which are peculiar to themselves. 1st. The words supposed to be declaratory of criminal intention may have been misunderstood or misremembered. 2d. It does not necessarily follow, because a man avows an intention, or threatens to commit a crime, that such intention really exists in his mind. 3d. Besides, another person really desirous of committing the offence may have profited by the occasion of the threat to avert suspicion from himself.[4] 4th. It must be remembered that a threat or declaration of this nature tends to frustrate its own accomplishment.

IV. **Change of life or circumstances** not easily capable of explanation, except on the hypothesis of the possession of the fruits of crime; as, for instance, where, shortly after a larceny or robbery, or the suspicious death or disappearance of a person in good circumstances, a person previously poor is found in the possession of considerable wealth, and the like. When standing alone, this is not ground for putting a party on his defence.[5]

V. **Evasion of justice.**— By "evasion of justice" is meant the doing some act indicative of a desire to avoid or stifle judicial inquiry into an offence, of which the party doing the act is accused or suspected. Such desire may be evidenced by his flying from the country or neighborhood; removing himself, his family, or his goods to another place; keeping concealed, etc. To these must be added the kindred

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2. Opportunity for penitence.

3. Chamberlayne's Best's Evidence, §§ 455, 456.

4. See an interesting case in note b, Chamberlayne's Best's Evidence. § 458.

5. See Burdock's Case, appendix 1, case 2, Chamberlayne's Best's Evidence, § 459.

acts of bribing or tampering with officers of justice, to induce them to permit escape, suppress evidence, etc. All these afford a presumption of guilt, more or less cogent according to circumstances.[6]

VI. **Fear indicated by passive deportment, etc.**— The following **physical symptoms** may be indicative of fear: "Blushing, paleness, trembling, fainting, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, hesitation, stammering, faltering of the voice," etc.; and, as the probative force of each of these depends on the correctness of the inference that the symptom has been caused by fear of detection of the offence imputed, two classes of infirmative hypotheses naturally present themselves: 1st. The emotion of fear may not be present in the mind of the individual. 2d. The emotion of fear, even if actually present, although presumptive, is by no means conclusive evidence of guilt of the offence imputed. Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection.

Closely allied to this subject is the inference of the existence of alarm, and though it of delinquency, derived from confusion of mind; as expressed in the countenance, or by discourse, or conduct. This, however, like the former, is subject to the infirmative hypotheses,— 1st. That the alarm may be caused by the apprehension of some other crime, or some disagreeable circumstance coming to light; 2d. Consciousness on the part of the accused or suspected person that, though innocent, appearances are against him.[7]

VII. **Fear indicated by a desire for secrecy.**— The presence of fear may be evidenced in another way, namely, by acts showing a desire for secrecy; such as doing in the dark what, but for the criminal design, would naturally have been done in the light; choosing a spot supposed to be out of the view of others for doing that which, but for the criminal design, would naturally have been done in a place open

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6. Chamberlayne's Best's Evidence, § 460 *et seq.* and note, with cases cited.

7. Chamberlayne's Best's Evidence, § 466 and notes.

to observation; disguising the person; taking measures to remove witnesses from the scene of the intended unlawful actions, etc.[8] Acts such as these are, however, frequently capable of explanation. 1st. It is perfectly possible that the design of the person seeking secrecy may be altogether innocent, at least so far as the criminal law is concerned. 2d. The design, even if criminal, may be criminal with a different object, and of a degree less culpable than that attributed.

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8. Id., § 467. See, generally, as to mental states, fear, etc., 3 Chamberlayne on Evidence, § 1933 *et seq.*

CHAPTER III.

PRIMARY AND SECONDARY EVIDENCE.

The exaction of original evidence is unquestionably one of the most marked features of English law. In the present chapter we propose to consider the application of this principle to the proof of instruments and documents, which are sufficiently identified by description, and proximate to the issues raised, to be at least *prima facie* receivable in evidence. Such are said to be the "**primary evidence**" of their own contents; and the term "**secondary evidence**" is used to designate any derivative proof of them; such as memorials, copies, abstracts, recollections of persons who have read them, etc. It is a general and well-known rule, that **no secondary evidence of a document can be received until an excuse such as the law deems sufficient is given for the non-production of the primary.**[1] Whether a proper foundation has been laid for the admission of secondary evidence is to be determined by the judge, and if this depends on a disputed question of fact he must decide it.

Is this principle confined to evidence in causa, or does it extend to evidence extra causam? The following questions were put by the House of Lords, and the following answers given by the judges, during the proceedings against Queen Caroline, in 1820:[2] "First, Whether, in the courts below, a party, on cross-examination, would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such let-

1. "Evidence which a presiding judge is required to admit as a matter of course, without calling on the producer to explain the absence of any other method of proving the fact, is primary. Other evidence is secondary." 1 Chamberlayne on Evidence, § 464, note 1.

2. 2 B. & B. 286-291.

ter? " " Secondly, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part or such one or more lines; and, in case the witness shall not admit that he did or did not write the same, whether the witness can be examined as to the contents of such letter? " " Thirdly, Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read? " The first of these questions the judges answered in the negative; on the ground that " The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness. If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then the whole of the letter is made evidence."

The first part of the second question, namely, " Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part? " the judges thought, should be answered by them in the affirmative in that form; but to the latter, " and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such

letter," they answered in the negative, for the reasons already given. To the first part of the third question, Lord Chief Justice Abbott answered as follows: "The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but that the letter itself must be read to manifest whether such statements are or are not contained in that letter." To the latter part of the question he returned for answer, "The judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence, in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel who is cross-examining suggests to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below, and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."

The foregoing questions and answers were followed by this:[3] "Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?" Lord Chief Justice Abbott delivered the following answer of the judges: "The judges find a difficulty to give a distinct answer to the question thus proposed by your lordships,

3. 2 B. & B. 292-294.

either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships, as distinctly referring to such a question propounded by counsel on cross-examination as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, 'whether a witness has made such and such representation,' has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at Nisi Prius, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked whether there is an agreement for a certain price for a certain article,— an agreement for a certain definite time,— a warranty,— or other matter of that kind, being a matter of contract; and when a question of that kind has been asked at Nisi Prius the ordinary course has been for the counsel on the other side not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side was or was not in writing; and, if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced. My lords, therefore, although we cannot answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing (the proper course being to put the writing into his hands and ask him whether it be his writing), we each of us think that, if such a question were propounded before us at Nisi Prius, and objected to, we should direct the counsel to separate the question into its parts. By dividing the question into parts, I mean, that the counsel would be directed to ask whether the representation

had been made in writing or by words. If he should ask whether it had been made in writing, the counsel on the other side, would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it."[4]

When the absence of the primary source of evidence has been accounted for, secondary evidence is receivable. The excuses which the law allows for dispensing with primary evidence are, **that the document has been destroyed or lost; or that it is in the possession of the adversary,** who does not produce it after due notice calling on him so to do; or in that of **a party privileged to withhold it,** who insists on his privilege; or who is **out of the jurisdiction of the court,** and consequently cannot be compelled to produce it.

Whether a sufficient foundation has been laid for admitting secondary evidence depends on whether sufficient proof has been given of the destruction or loss of the document; whether a notice to produce is required,— as in many cases the proceedings amount to constructive notice; and if so, whether the notice given is sufficient in its terms, and has been given in proper time, etc. There are, however, some general principles which should always be borne in mind. First. **Whether sufficient search has been made** for a document depends much on its nature and the circumstances of the case,— as a useless document may be presumed to have been lost or destroyed, on proof of a much less search, and after a much shorter time, than an important one. Secondly. **The sole object of such a notice is to enable the party to have the document in court** to produce it if he likes; and if he does not, then to enable the opponent to give secondary evidence. Accordingly, where a party to a suit, or his attorney, has a document with him in

4. This rule has been changed in England by the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125, sec. 24), and by 28 Vict., c. 18, secs. 1 and 5. See the strictures of Mr. Best on the answers of the judges in Queen Caroline's Case in Chamberlayne's Best's Evidence, § 481.

court, he may be called on to produce it without previous notice; and in the event of his refusing, the opposite party may give secondary evidence.[5]

Secondary evidence must be legitimate evidence, inferior to the primary solely in respect of its derivative character. Thus, the copy of a copy of a destroyed or lost document is not receivable in evidence, even though, as it seems, the absence of the first copy has been satisfactorily explained.[6]

It is of the utmost importance to remember that **there are no degrees of secondary evidence.** A party entitled to resort to this mode of proof may use any form of it; his not adducing, or even wilfully withholding, some other, likely to be more satisfactory, is only matter of observation for the jury. Thus, the evidence of a witness who has read a destroyed or lost document is perfectly receivable, although a copy or abstract of it is in existence, and perhaps even in court.[7]

There are several **exceptions** to the rule which requires primary evidence to be given. The following are the principal: 1. **Where the production of it is physically impossible,** as where characters are traced on a rock; or, 2. **Where it would be highly inconvenient** on physical grounds; as where they are engraven on a tombstone, or chalked on a wall or building, or contained in a paper permanently fixed to it, etc.[8]

3. **With respect to the proof of records, and other public documents of general concernment,** their contents may be proved by derivative evidence. But the law requires this derivative evidence to be of a very trustworthy kind; and

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5. See, generally, Chamberlayne's Best's Evidence, § 482 *et seq.*; 1 Chamberlayne on Evidence, §§ 464-472, 478 *et seq.* (as to primary evidence); id., § 473 *et seq.* (secondary evidence).

6. Gilb. Ev. (4th Ed.) 9; Chamberlayne's Evidence, § 483 and notes. See, however, *contra*, Winn v. Patterson, 9 Pet. 663; Goodrich v. Weston, 102 Mass. 362.

7. Doe *ex dem.* Gilbert v. Ross, 7 M. & W. 102; Chamberlayne's Best's Evidence, § 483; Chamberlayne on Evidence, §§ 339-342 and notes.

8. Chamberlayne on Evidence, § 2958; Tracy Peerage Case, 10 Cl. & F. 154; 6 M. & W. 58, 63, 68; 2 Ex. 411; 11 id. 129; 9 M. & W. 675.

has defined, with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings. Thus, it must, at least in general, be in a **written** form, i. e., in the shape of **a copy**; and, as already mentioned, must not be a copy of a copy. In very few, if in any instances, is oral evidence receivable to prove the contents of a record or public book which is in existence.

The principal sorts of copies used for the proof of documents are,— 1. **Exemplifications under the great seal.** 2. **Exemplifications under the seal of the court where the record is.** 3. **Office copies,** i. e., copies made by an officer appointed by law for the purpose. 4. **Examined copies.** An examined copy is a copy sworn to be a true copy, by a witness who has compared it line for line with the original, or who has examined the copy while another person read the original. The document must be in a character and language that the witness understands, and he must also have read the whole of it. According to most authorities, when the latter of the above modes of examination is resorted to, it is unnecessary to call both the persons engaged in it, or that they should have alternately read and inspected the original and copy. 5. **Copies signed and certified as true by the officer to whose custody the original is intrusted.**[9] 6. **Photograph copies,**[1]— of all others the best for showing any peculiarities that exist in the original document, and consequently invaluable in cases turning on those peculiarities. There are a few instances where none of these various species of copies is receivable, and the original must be produced. Of these the principal is where the gist of a party's action or defence lies in a record of the court where the cause is, and issue is joined on a plea of **nul tiel record.**

Public documents, though not of a judicial nature,—such as registers of births, marriages, and deaths; the books of

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9 See, generally, Chamberlayne on Evidence, § 506 *et seq.;* Chamberlayne's Best's Evidence, § 486 *et seq.* and notes; 1 Greenl. Ev. (12th Ed.), §§ 479-484 and cases cited.

1. See Chamberlayne's Best's Evidence, § 486; 1 Chamberlayne on Evidence, § 729.

the Bank of England, or of the East India Company; bank bills on file at the bank, etc.,— are, in general, provable by examined copies.[2]

4. Another exception is in the case of **public officers.** It is a general principle that **a person's acting in a public capacity is prima facie evidence of his having been duly authorized so to do**; and even though the office be one the appointment to which must be in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production.[3]

5. **Where a witness is being interrogated on the voir dire,** with the view of ascertaining his competency, if that that competency depends on written instruments he may state their nature and contents.[4]

Circumstantial evidence, when original and proximate in its nature, is not affected by the rule. It seems also, although much has been said and written on both sides of the question, that statements by a party against his own interest are receivable as primary proof of documents.[5]

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2. Chamberlayne's Best's Evidence, § 487 and notes. The student should always consult the statutes as to the method of certification and by whom necessary to be made.

3. Chamberlayne's Best's Evidence, §§ 356, 357.

4. Tayl. Ev., §§ 433, 1242; Chamberlayne's Best's Evidence, § 490.

5. Chamberlayne's Best's Evidence, § 491. See *post*, ch. 7.

CHAPTER IV.

DERIVATIVE EVIDENCE IN GENERAL.

The danger of this kind of proof increases according to its distance from its source, and the number of media or instruments through which it comes to the cognizance of the tribunal. **There are five forms of it:**— 1. **Supposed oral evidence, delivered through oral.** 2. **Supposed written evidence, delivered through written.** 3. **Supposed oral evidence, delivered through written.** 4. **Supposed written evidence, delivered through oral.** 5. **Reported real evidence.** The last of these, and the secondary evidence of documents which would be evidence if produced, have been already considered; and the present chapter will be devoted to the admissibility of derivative evidence in general.

The general rule is, that derivative or second-hand proofs are not receivable as evidence in causa,— a rule which forms one of the distinguishing features of our law of evidence. **The reasons** commonly assigned for it are: 1. That the party against whom the proof is offered has no opportunity of cross-examining the original source whence it is derived. 2. That, assuming the original evidence truly reported, it was not itself delivered under the sanction of an oath. The derivative evidence would not, however, be the more receivable if the original evidence were delivered under that sanction.

The foundations of the rule lie much deeper than this. Instead of stating as a maxim, that the law requires all evidence to be given on oath, we should say that **the law requires all evidence to be given under personal responsibility;** i .e., every witness must give his testimony under such circumstances as expose him to all the penalties of falsehood which may be inflicted by any of the sanctions of truth.

The rule in question is commonly enunciated, both in the books and in practice, by the maxim, " **Hearsay is not evi-**

dence,"[1]—an expression inaccurate, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind: first, directly, that what a person has been heard to say is not receivable in evidence; and, secondly, by implication, that whatever has been committed to writing, or rendered permanent by other means, is receivable; positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest is not only receivable, but is the very best evidence against him; and on the other, written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with **res gestae**, i. e., the original proof of what has taken place; which may consist of words, as well as of acts.[2] Thus, on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be; and so are the cries of a woman who is being ravished, and her complaint afterwards, but not the particulars of such complaint. **We are not to consider whether evidence comes by word of mouth or by writing, but whether it is original in its nature**, or indicates any better source from which it derives its weight.

There are several **exceptions** to the rule excluding second-hand evidence:—

1. **On a second trial of a cause between the same parties, the evidence of a witness examined at the former trial, and since deceased, is receivable**; and may be proved by the testimony of a person who heard it, or by notes made at the time.[3]

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1. See, generally, Chamberlayne's Best's Evidence, Book 3, ch. 4; Chamberlayne on Evidence, § 2791.

The subject of hearsay is treated at great length in Chamberlayne on Evidence See vol. 4, index, Hearsay, for details.

2. See *res gestae* defined and considered at length in 4 Chamberlayne on Evidence, § 2581 *et seq.* See, also, Chamberlayne's Best's Evidence, § 495 *et seq.* and cases cited.

3. Provided, however, that the party against whom it is offered had the right of cross-examination and that the parties to the writ and questions at issue are substantially the same. 1 Greenl. Ev., §§ 163-168; Chamber-

2. The next exception is in **the proof of matters of public and general interest**; such as the boundaries of counties or parishes, rights of common, claims of highway, etc., which the law allows to be proved by general reputation;— e. g., by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject; by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, etc. But in order to guard against fraud, it is an established principle that **such declarations, etc., must have been made ante litem motam**; which seems to mean, before any controversy has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit.[4]

3. **Matters of pedigree**, e. g., the fact of relationship between particular persons, the births, marriages, and deaths, of members of a family, etc., form the next exception. Thus, declarations of deceased members of a family, made *ante litem motam,* and not made by the declarant obviously for his own interest; the general reputation of a family proved by a surviving member of it; entries contained in books, such as family Bibles, if produced from the proper custody, even although there be no evidence of the handwriting or authorship of such entries; correspondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin plates; charts of pedigrees made or adopted by deceased members of the family, etc.,— have severally been held receivable in evidence for this purpose.[5]

4. The next exception is that **ancient documents** purporting to constitute part of, or at least to have been executed contemporaneously with, the transactions to which they relate, are receivable as evidence of ancient posses-

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layne's Best's Evidence, § 496, note, p. 448 and cases cited; 2 Chamberlayne on Evidence, §§ 1659-1675.

4. See 4 Chamberlayne on Evidence, §§ 2773, 3330; Chamberlayne's Best's Evidence, § 497 and notes.

5. Chamberlayne's Best's Evidence, § 498; 4 Chamberlayne on Evidence, § 2953.

6. Chamberlayne's Best's Evidence, § 499, note, p. 452; 2 Chamberlayne on Evidence, § 1195 *et seq.*

sion, in favor of those claiming under them, and even against others who are neither parties nor privies to them. The document must, however, be shown to have come from the proper custody, i. e., to have been found in a place in which, and under the care of persons with whom, it might naturally and reasonably be expected to be found.[6]

5. **Declarations made by deceased persons against their own interest** are receivable in evidence in proceedings between third parties, provided such declarations were made against proprietary or pecuniary interest, and do not derogate from the title of third parties;[7] e. g., a declaration made by a deceased tenant is not admissable if it derogates from the title of the reversioner.

6. Allied to these are **declarations in the regular course of business, office, or employment, by deceased persons,** who had a personal knowledge of the facts, and no interest in stating an untruth. But the rule as to the admission of such evidence is confined strictly to the particular thing which it was the duty of the person to do; and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. This class of declarations must also have been made contemporaneously with the acts to which they relate.[8]

7. The civil law, and the laws of some foreign countries, receive **the books of tradesmen,** made or purporting to be made by them in the regular course of business, as evidence to prove a debt against a customer or alleged customer; and such books were at one time receivable as evidence in England. But though not themselves admissable as evidence, almost all the advantage derivable from tradesmen's books, with little or none of their danger, is obtained under the law as it now stands. For not only may **the tradesman appear as a witness, and use his books as memoranda to refresh his memory,** with respect to the goods supplied, but those books are always available as "**indica-**

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7. Chamberlayne's Best's Evidence, § 500 and note, p. 453.

8. The leading case upon this exception is Price v. Lord Torrington, Salk., 285; 1 Smith's Lead. Cases, 390. See the notes where the cases are fully collected.

tive" evidence; and, especially in the event of the bankruptcy of the tradesman, they are often found of immense value to himself or those who represent him.[9]

8. **Books of a deceased incumbent,**— rector or vicar,— containing receipts and payments by him relative to the living, have frequently been held receivable in evidence for his successors. This has been considered anomalous.[1]

9. The last exception to this rule is that of **declarations made by persons under the conviction of their impending death.**[2] The circumstances under which such declarations are made may fairly be assumed to afford a guaranty for their truth, at least equal to that of an oath taken in a court of justice. Hence the dying declarations of a child of tender years will be rejected, unless he appears to have had that degree of religious knowledge which would render his evidence receivable; as likewise will those of an adult whose character shows him to have been a person not likely to be affected with a religious sense of his approaching dissolution.

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9. Chamberlayne's Best's Evidence, §§ 501-504, note, p. 444 *et seq.* See, generally, 4 Chamberlayne on Evidence, title, Book Entries, Account Books, § 3051 *et seq.*

1. Chamberlayne's Best's Evidence, § 504.

2. 4 Chamberlayne on Evidence, §§ 2767, 2831 and notes, where the cases are fully collected.

CHAPTER V.

EVIDENCE AFFORDED BY THE WORDS OR ACTS OF OTHER PERSONS.

"Res inter alios acta alteri nocere non debet."[1] **No person is to be affected by the words or acts of others, unless he is connected with them,** either personally, or by those whom he represents or by whom he is represented. The expression "inter alios" does not mean that the act must be the act of more than one person. Nor does it make any difference that the act was done or confirmed by oath.

There is this point of **resemblance between second-hand evidence and res inter alios acta,** that the latter, like the former, must not be understood as excluding proof of *res gestae.* **The true meaning of the rule is simply this, that a party is not to be affected by what is done behind his back.** Thus, if the question between plaintiff and defendant were, whether the former had paid a sum of money to D.; a receipt by D., acknowledging payment to him by the plaintiff of the money in question, would not, *per se,* be evidence of such payment as against the defendant, it being *res inter alios acta;* and yet it would be admissible as part of the *res gestae* for the purpose of proving such payment. So, when the matter in issue consists of an act which is separable from the person of the accused, who is nevertheless accountable for it, proof may be given of that act before he is connected with it by evidence. An illustration is afforded by prosecutions for conspiracy, where it is a settled rule that general evidence may be given to prove the existence of a conspiracy, before the accused is shown to be connected with it; for here the *corpus delicti* is the conspiracy, and the participation of the accused is an independent matter, which may or may not exist.[2] The rule that **the acts and declarations of conspirators** are evidence against their fellows, rests partly on this principle and

1. A transaction between two parties ought not to harm a third. Broom's Leg. Max., *857 and notes. See 4 Chamberlayne on Evidence, § 3207 *et seq.* and notes; Chamberlayne's Best's Evidence, § 506 and notes.

2. Chamberlayne's Best's Evidence, § 508 and notes.

partly on the law of principal and agent. The following summary of the practice is fully supported by authority. "Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law the act of the whole party; and therefore the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations made by one of the party at the time of doing such illegal act seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the exection of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence. And, in general, proof of concert and connection must be given before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in futherance of the unlawful design is in law the act of all, and that a declaration made by one of the parties at the time of doing such an act is evidence against the others."[3]

There are **exceptions** to this rule. Thus, although in general strangers are not bound by and cannot take advantage of estoppels, yet it is otherwise when the estoppel runs to the disability or legitimation of the person. So, a judgment *in rem,* in the Exchequer, is conclusive against all the world.[4] The admissibility in evidence of many documents of a public and quasi public nature is at variance with this principle.

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3. See, generally, 4 Chamberlayne on Evidence, § 3244 *et seq.* and notes.

4. See Chamberlayne's Best's Evidence, § 510 and *post,* Book 3, pt. 2, ch. 9.

CHAPTER VI.

OPINION EVIDENCE.

The use of witnesses being to inform the tribunal respecting facts, their **opinions are not in general receivable as evidence.** The meaning of the rule is, simply, that questions shall not be put to a witness which, by substituting his judgment for theirs, virtually put him in the place of the jury.

The rule is subject to the following exceptions:—

1. **On questions of science, skill, trade,** and the like, persons conversant with the subject matter,— called "experts"—are permitted to give their opinions in evidence. But where scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved.

The weight due to this, as well as to every other kind of evidence, is to be determined by the tribunal; which should form its own judgment on the matters before it, and is not concluded by that of any witness, however highly qualified or respectable.[1]

2. Another class of exceptions exists **where the judgment or opinion of a witness, on some question material to be considered by the tribunal, is formed on complex facts,** which from their nature it would be impossible to bring before it. Thus, the identification by a witness of a person or thing is necessarily an exercise of his judgment. So, the state of an unproducible portion of real evidence — as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository — may be explained by a term expressing a complex idea; e. g., that it looked old, decayed, or fresh, was in good or bad condition, etc. So also may the emotions or feelings of a party whose psychological condition

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1. See, generally, 3 Chamberlayne on Evidence, § 2375 *et seq.* and notes; Chamberlayne's Best's Evidence, § 511 *et seq.* and note, p. 473; Lawson on Expert Testimony; Rogers on Expert Testimony.

is in question: thus, a witness may state whether, on a certain occasion, he looked pleased, excited, confused, agitated, frightened, or the like. To this head also belongs the proof of handwriting, *ex visu scriptionis* and *ex scriptis olim visis*. And it is on this principle that testimony to character is received. In all cases, of course, the grounds on which the judgment of the witness is formed may be inquired into on cross-examination.[2]

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2. See next note, *ante*.

CHAPTER VII.

SELF-REGARDING EVIDENCE.

SECTION I.

Self-regarding Evidence in General.

IN the preceding chapters we have shown the general nature of those rules by which evidence is rejected, for want either of originality or of proximity. The present will be devoted to that species of evidence, for or against a party, which is afforded by the language or demeanor of himself, or of those whom he represents, or of those who represent him. All such evidence we purpose to designate by the expression "**self-regarding.**" When in favor of the party supplying it, the evidence may be said to be "**self-serving;**" when otherwise, "**self-harming.**"

The rule of law with respect to self-regarding evidence is, that when in the self-serving form it is not in general receivable; but that in the self-harming form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind.[1]

The subject of self-serving evidence may be despatched in few words, and indeed has been substantially considered under the title, "Res inter alios acta alteri nocere non debet." There are, however, some **exceptions to** the rule excluding it. The first is, that, where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider and attach what weight they see fit to any self-serving statements it contains.[2] Again, a person on his trial may, at least if not defended by counsel, state matters in his defence which are not already in evidence, and which he is not in a condition to prove, and the

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1. Chamberlayne's Best's Evidence, § 518 *et seq.* and notes, p. 485; 2 Chamberlayne on Evidence, § 1540; 3 id., § 1933; 4 id., § 2734 and notes, where the cases are fully collected.

2. Tayl. Ev., § 655; Chamberlayne's Best's Evidence, § 520.

jury may act on that statement if they deem it worthy of credit.[3]

Self-harming evidence may be supplied by *words, writing, signs,* or *silence.* Words addressed to others, and writing, are the most usual forms; but words uttered in soliloquy seem equally receivable; while of signs it has justly been said, "Acta exteriora indicant interiora secreta."[4] So of silence, " Qui tacet, consentire videtur,"[5]— a maxim which must be taken with considerable limitation. The principal application of this maxim is in criminal cases, where a person charged with having committed an offence makes no reply.

As to the different kinds of self-harming statements. In the first place they are either " judicial " or " extra-judicial,"— according as they are made in the course of a judicial proceeding, or under any other circumstances.[6]

2. Self-harming statements in civil cases are usually called " **admissions,**" and those in criminal cases " **confessions.**"

3. **Self-harming statements are divisible into " plenary " and " not plenary."** A " **plenary** " confession is when a self-disserving statement is such as, if believed, to be conclusive against the person making it, at least on the physical facts of the matter to which it relates; as where a party accused of murder says, " I murdered," or " I killed," the deceased. In such cases the proof is in the nature of *direct* evidence. A confession" **not plenary** " is where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates; but only gives rise to a presumptive inference of their truth, and is therefore in the nature of *circumstantial* evidence. A. is found murdered, or the goods of B. are proved to have been stolen, and the accused or suspected person says, " I am very sorry that I ever had anything to do with A.," or " that I ever meddled with the goods of B."[7]

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3. See *post,* Book 4, pt. 1.

4. Exterior acts indicate interior secrets. See Chamberlayne's Best's Evidence, § 521.

5. He who is silent, seems to consent. Id.

6. Id., § 522.

7. Id., § 524.

Although a party may admit the contents of a document, he could not, before the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), by admitting the execution of a deed, (except when such admission was made for the purpose of a cause in court,) dispense with proof of it by the attesting witness.[8]

So far as its admissibility in evidence is concerned, **it is in general immaterial to whom a self-harming statement is made.** But if coming under the head of what the law recognizes as confidential communication,[9] it will not be received in evidence; neither will it, if embodied in a communication made "without prejudice," the object of such being to buy peace, and settle disputes by compromise instead of by legal proceedings.[1]

Self-harming statements, etc., made by a party when his mind is not in its natural state, ought, in general, to be received as evidence, but his state of mind should be taken into consideration by the jury as an infirmative circumstance.[2] Thus, a confession made by a prisoner when drunk has been received.[3] What a person has been heard to say while talking in his sleep seems not to be legal evidence against him, however valuable it may be as indicative evidence; for here the suspension of the faculty of judgment may fairly be presumed complete.[4] The acts of persons of unsound mind, also, are not in general binding.[5]

A party is not in general prejudiced by self-harming statements made under a mistake of fact. But it is very different when the confession is made under a mistake of law. Neither is a party to be prejudiced by a *confessio juris,* although this must be understood with reference to a confession of law not involved with facts; for the confes-

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8. Chamberlayne's Best's Evidence, § 527 and notes.

9. Considered *post*, ch. 8.

1. Chamberlayne's Best's Evidence, § 528.

2. Id., § 529.

3. Rex v. Spilsbury, 7 C. & P. 187. See Gore v. Gibson, 13 M. & W. 623; s. c., Ewell's Lead. Cases (1st ed.) 734 and notes.

4. See Rex v. Sippets, cited in note Chamberlayne's Best's Evidence, § 529.

5. See Moulton v. Camroux, 2 Ex. 487; s. c., 4 id. 17; s. c., Ewell's Lead. Cases, 614 and notes.

sion of a matter compounded of law and fact is receivable.[6]

Self-harming statements may in general be made, either by a party himself, or by those under whom he claims, or by his attorney or agent lawfully authorized. This of course implies that the party against whom the admission or confession is offered in evidence is of capacity to make such admission or confession.[7]

SECTION II.

Estoppels.

An estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts; and is that species of *praesumptio juris et de jure* where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done.[8]

The most important rules respecting estoppels are the following: —

1. **Estoppels must be mutual or reciprocal,** i. e., binding both parties. But this does not hold universally; for instance, a feoffor, donor, lessor, etc., by deed poll will be estopped by it, although there is no estoppel against the feoffee, etc.[9]

2. **In general, estoppels affect only the parties and privies** to the act working the estoppel; strangers are not bound by them, and cannot take advantage of them.[1]

3. **It seems that conflicting estoppels neutralize each other,** or, as our books express it, "Estoppel against estoppel doth put the matter at large."[2]

Estoppels are of three kinds: 1. By matter of record. 2. By deed. 3. By matter of pais.

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6. Chamberlayne's Best's Evidence, § 530.

7. Id., 531.

8. See, generally, 2 Chamberlayne on Evidence, § 1387 and notes, and Bigelow on Estoppel; The Duchess of Kingston's Case, 2 Smith's Lead. Cases, *573 and notes.

9. Chamberlayne's Best's Evidence, § 535 and notes.

1. Id., § 536.

2. Id., § 537.

1. **Estoppels by matter of record; as letters patent, fine, recovery, pleading, etc.** The most important form of this is estoppel by **judgment,** which will be considered under the head of *res judicata.*[3]

With respect to estoppels by pleading. A party who does not plead within the time required by law is taken to confess that his adversary is entitled to judgment. So a party may, by resorting to one kind of plea, be concluded from afterwards availing himself of another.[4]

As to the effect of admissions, express or implied, in pleadings, the following rule, which certainly savors of technicality, is laid down in the books, viz.: that **the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, cannot be again litigated between the same parties, and are conclusive evidence between them,** but only if the traverse is found against the party making it.

2. **Estoppels by deed.** "A deed," says Mr. Justice Blackstone, " is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefor **a man shall always be estopped by his own deed,** or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed." This rule, however, must be understood to apply only where an action is brought to enforce rights arising out of the deed, and not collateral to it; and it does not include the case of a mere general recital in a deed, such general recital not having the effect of an estoppel. It is only a special recital of a particular fact in a deed which will estop.[5]

3. **Estoppels by matter in pais.** " Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring, against the latter, a

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3. *Post,* ch. 9.

4 Chamberlayne's Best's Evidence, §§ 540, 541, *post* Pleading.

5. 2 Bl. Com. *295, vol. 1 of this series; Chamberlayne's Best's Evidence, § 542.

different state of things as existing at the same time."[6]

Before dismissing the subject of estoppel, we would direct attention to the question, whether the maxim of the civil law, "**Allegans suam turpitudinem [suum crimen] non est audiendus,**"[7] is, or ever was, a maxim of the common law.

The modern authorities completely negative the existence of any such rule, so far as witnesses are concerned. It is now undoubted law, that a witness, although not always bound to answer them, may be asked questions tending to criminate, injure, or degrade him. So, it is the constant practice in criminal cases to receive the evidence of accomplices, who depose to their own guilt as well as to that of the accused; and it is not even indispensable, although customary and advisable, that some material part of the story told by the accomplice should be corroborated by untainted evidence.[8]

SECTION III.

Self-harming Statements in Criminal Cases.

SUBSECTION I.

Estoppels in Criminal Cases.

The first and most important is **the estoppel by judicial confession.** A confession of guilt, made by an accused person to a judicial tribunal having jurisdiction to condemn or acquit him, is sufficient to found a conviction, even where it may be followed by sentence of death; such confession being deliberately made, under the deepest solemnities, oftentimes with the advice of counsel, and always under the protecting caution and oversight of the judge. Still, if the confession appears incredible, or any illegal inducement to confess has been held out to the accused, or if he appears to have any object in making a

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6. Chamberlayne's Best's Evidence, § 543 and cases cited.

7. One who alleges his own turpitude should not be heard.

8. Chamberlayne's Best's Evidence, §§ 545, 546 and cases cited.

false confession, or if the confession appears to be made under any sort of delusion, or through fear and simplicity, the court ought not to receive it. So, if the offence charged is one of the class denominated "facti permanentis," and no other indication of a *corpus delicit* can be found. In ordinary practice a plea of guilty is never recorded by English judges, at least in serious cases, without first solemnly warning the accused that such plea will not entitle him either to mercy or a mitigated sentence, and freely offering him leave to retract it and plead not guilty.[9]

2. **An accused person must plead the different kinds of pleas in their regular order:** by pleading in bar, he loses his right to plead in abatement, etc.[1]

3. **An accused person may be estopped by various collateral matters** which do not appear on record. Thus he cannot challenge a juror after he has been sworn, unless it be for cause arising afterwards. If he challenges a juror for cause, he must show all his causes together.[2]

SUBSECTION II.

The Admissibility and Effect of Extra-judicial Self-criminative Statements.

Self-harming evidence is not always receivable in criminal cases, as it is in civil. There is this condition precedent to its admissibility, that the party against whom it is adduced must have supplied it *voluntarily,* or least *freely.* Every confession or criminative statement ought to be rejected, which has been extracted by physical torture, coercion, or duress of imprisonment; or which has been made after any inducement to confess has been held out to the accused, by, or with the sanction, express or implied, of any person having lawful authority, judicial or other-

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9. 1 Bish. Cr. Proc. (3d Ed.), § 795; 4 Black. Com. *328 (vol. 1, Book 4); Wash. Cr. Law (3d Ed.), 132; Chamberlayne's Best's Evidence, § 548.

1. See Chamberlayne's Best's Evidence, § 549; Wash. Cr. Law (3d Ed.), 129 *et seq.*

2. Chamberlayne's Best's Evidence, § 550.

wise, over the charge against him, or over his person as connected with that charge.[3] But in order to have this effect, the inducement thus held out must be in the nature of a promise of favor or threat of punishment. If, therefore, it appears that the accused was urged to speak the truth on moral grounds only, the confession or criminative statement will be receivable; as it also will be, when the supposed influence of an illegal inducement to confess may fairly be presumed to have been dissipated before the confession, by a warning from a person in authority not to pay any attention to it.

With respect to the effect of extra-judicial confessions, or statements when received, the rule is clear, that, unless otherwise directed by statute, no such confession or statement, whether plenary or not plenary, whether made before a justice of the peace or other tribunal having only an inquisitorial jurisdiction in the matter, or made by deed or matter *in pais,* either amounts to an estoppel, or has any conclusive effect against an accused person, or is entitled to any weight beyond that which the jury in their conscience assign to it.[4]

SUBSECTION III.

Infirmative Hypotheses affecting Self-criminative Evidence.

In the mediaeval tribunals of the civil and canon laws, **the inquisitorial principle** was essentially dominant. And this has so far survived, that in many Continental tribunals at the present day every criminal trial commences with a rigorous interrogation of the accused by the judge or other presiding officer. **The common law of England proceeds in a way quite the reverse of all this,—holding that the onus of proving the guilt of the accused lies on the accuser, and that no person is bound to criminate himself.** It has therefore always abstained from physical torture, and taken great care, perhaps too great care, to prevent sus-

3. 2 Chamberlayne on Evidence, § 1472 *et seq.* and notes; Chamberlayne's Best's Evidence, § 551.

4. Chamberlayne's Best's Evidence, §§ 552, 553 and notes.

pected persons from being terrified, coaxed, cajoled, or entrapped into criminative statements; and it not only prohibits judicial interrogation in the first instance, but, if the evidence against the accused fails in establishing a *prima facie* case against him, it will not even call on him for his defence. As, however, the introduction of judicial interrogation into this country has been warmly advocated by able jurists, we propose to examine briefly the claims of the conflicting systems.[5]

All false self-criminative statements are divisible into two classes,— those which are the result of **mistake** on the part of the confessionalist, and those which are made by him in expectation of **benefit.** And the former are twofold, — mistakes of fact and mistakes of law.

First, of **mistakes of fact.** A man may believe himself guilty of a crime, either when none has been committed, or where a crime has been committed, but by another person. Mental aberration is the obvious origin of many such confessions. But the actors in a tragedy may be deceived by surrounding circumstances, as well as the spectators.[6]

Next, as to **mistakes of law.** All confessions avowing delinquency in general terms are, more or less, *confessiones juris;* and this will in a great degree explain, what to unreflecting minds seems so anomalous, the caution exercised by British judges in receiving a plea of guilty.[7]

In the other class of **false self-criminative statements,** the statement is known by the confessionalist to be false, and is **made in expectation of some real or supposed benefit** to himself or others, or for the purpose of injuring others. It is obviously impossible to enumerate the motives which may sway the minds of men to make false statements of this kind.[8]

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5. Here follows a learned discussion of the question stated, too long for our purpose. The student is advised to read it carefully. See Chamberlayne's Best's Evidence, §§ 554-558.

6. Chamberlayne's Best's Evidence, § 561. As to self-regarding mental states, see 3 Chamberlayne on Evidence, § 1933. See, also, 2 id., § 1592.

7. Chamberlayne's Best's Evidence, § 562 *et seq.* and cases cited.

8. The author, in §§ 563 to 572, proceeds to enumerate and discuss the

Extra-judicial confessorial statements, especially when not plenary, are subject to additional infirmative hypotheses. These are **mendacity** in the report, **misinterpretation** of the language used, and **incompleteness** of the statement.

1. "**Mendacity.**" The supposed confessorial statement may be either wholly or in part a fabrication of the deposing witnesses. 2. "**Misinterpretation.**" No act or word of man, however innocent or even laudable, is exempt from this. 3. "**Incompleteness**"; i. e., where words, though not misunderstood in themselves, convey a false impression, for want of some explanation which the speaker either neglected to give, or was prevented by interruption from giving, or which has been lost in consequence of the deafness or inattention of the hearers.[9]

As to the force and effect of "non-responsion," or silence under accusation, "evasive responsion," and "false responsion."

"**Non-responsion.**" When a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he makes neither reply nor remark, the inference naturally arises that the imputation is well founded, or he would have repelled it.[1] However strongly such a circumstance may tell against suspected persons in general, there are many considerations against investing it with conclusive force. 1. **The party**, owing to deafness, or other cause, **may not have heard the question** or observation; **or**, even if he has, **may not have understood** it as conveying an imputation upon him. 2. Supposing the accused to have heard the question or observation, and understood it as conveying an imputation upon him, his momentary silence may be caused by **impediment of utterance, or a feeling of surprise** at the imputation. 3. When this kind of evidence

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most obvious of the motives for making false self-criminative statements. For details see the original work and cases there cited.

9. Chamberlayne's Best's Evidence, § 573.

1. Considered *ante*, Book 3, pt. 2, ch. 7, sec. 1. See, also, Chamberlayne's Best's Evidence, § 574.

is in an extra-judicial form, the transaction comes to the tribunal through the testimony of **witnesses, who may either have misunderstood, or who wilfully misreport it.** 4. Assuming the matter correctly reported, "the strength of it" (i. e., the inference of guilt from evidence like that we are now considering) "depends principally upon two circumstances: **the strength of the appearances** (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated),— the strength of the appearances, **and the quality of the interrogator.**"[2]

Connected with the subject of non-responsion is that of incomplete or "**evasive responsion**"; i. e., where a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he either evades the question, or, while denying his guilt, refuses to show his innocence, or to answer or explain any circumstances which are brought forward against him as criminative or suspicious. The inference of guilt from such conduct is weakened by the following additional considerations. 1. A man ever so innocent cannot always explain all the circumstances which press against him. 2. In many cases an accused or suspected person can only explain particular circumstances by criminating other individuals whom he is unwilling to expose, or disclosing matters which, though unconnected with the charge, he is anxious to conceal Sometimes, too, though blameless in the actual instance, he could only prove himself so by showing that he was guilty of some other offence. 3. Where a prosecution is altogether groundless,— the result of conspiracy, or likely to be supported by perjured testimony,— it is often good policy on the part of its intended victim not to disclose his defence until it is judicially demanded of him on his trial.[3]

"**False responsion,**" however, is a criminative fact very much stronger than either of the former. The infirmative

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2. See next note, *supra*.

3. Chamberlayne's Best's Evidence, § 575.

hypotheses here seem to be,—1. The possibility of extra-judicial conversations having been misunderstood or misreported. 2. As innocent persons, under the influence of fear, occasionally resort to false evidence in their defence, false statements may arise from the same cause.[4]

4. Id., § 576 *et seq.*, note, p. 526 and cases cited. See, generally, as to admissions by conduct, 2 Chamberlayne on Evidence, ch. 19, where the subject is exhaustively considered and the cases collected in the notes.

CHAPTER VIII.

EVIDENCE REJECTED ON GROUNDS OF PUBLIC POLICY.

The expression, "evidence rejected on grounds of public policy," is here used in a limited sense; as signifying that principle by which evidence, receivable so far as relevancy to the matters in dispute is considered, is rejected on the ground that, from its reception, some collateral evil would ensue to third parties or to society.

One species of this has been already treated of, under the head of **witnesses,** who are privileged from answering questions having a tendency to criminate, or to expose them to penalty or forfeiture, or even, in some cases, merely to degrade them.[2] But, taking a general view of the subject, **the matters thus excluded on grounds of public policy may be divided into political, judicial, professional, and social.**

I. Under the first come all secrets of state, such as state papers; and all communications between government and its officers;— the privilege in such cases not being that of the person who is in possession of the secret, but that of the public, as a trustee for whom the secret has been intrusted to him.[3]

II. **Judicial.**—The principal instance of this is in the case of **jurymen.** First, **grand jurors** cannot, at least in general, be questioned as to what took place among or before them, while acting as such.[4]

Secondly, the evidence of **petty jurors** is not receivable to prove their own misbehavior, or that a verdict which they have delivered was given through mistake.[5]

III. **Professional.**— 1. At the head of these stand communications made by a party to his **legal advisers,** i. e.,

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2. *Ante*, Book 2, pt. 1, ch. 1.

3. See Dawkins v. Lord Rokely, L. R. 8 Q. B. 255; Official Secrets Act of 1889 (England), § 2; Chamberlayne's Best's Evidence, § 578, note, p. 537.

4. Consult local statutes; Chamberlayne's Best's Evidence, § 579.

counsel, attorney, etc.; and this includes all media of communication between them, such as clerks, interpreters, or agents. But the privilege does not extend to matters of fact, which the attorney knows by any other means than confidential communication with his client, though if he had not been employed as attorney he probably would not have known them. And the privilege is not the privilege of the professional man, but of the client, who may waive it or not, as he pleases. And his refusal to waive it raises no presumption against him.[6]

2. Communications to a **medical man**, even in the strictest professional confidence, have been held not protected from disclosure,— a rule harsh in itself, of questionable policy, and at variance with the practice in France, and the statute law in some of the United States of America.[7]

3. Whether communications made to **spiritual advisers** are, or ought to be, protected from disclosure in courts of justice, presents a question of some difficulty. It it commonly thought that the decisions of the judges in the cases of R. v. Gilham,[8] and R. v. Wild,[9] added to some others, have resolved this question in the negative; and the practice is in accordance with that notion.[1]

IV. **Social.**—The applications of this principle to social life are few. The principal instance is in the case of communications between **husband and wife.** Such, says Professor Greenleaf,[2] " belong to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and

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5. Id., § 580; Stroker v. Graham, 4 M. & W. 721. Consult works on New Trials, Baylies; Graham & Waterman *et al.*

6. See Cooley's Const. Lim. (7th Ed.), 477, 478.

7. New York, Missouri, Michigan, Wisconsin, and Iowa, and perhaps other states, have statutes creating a privilege in certain cases. Consult the statutes. See Chamberlayne's Best's Evidence, § 582.

8. 1 Moo. C. C. 186.

9. Id., 452.

1. Consult the local statutes. There is no privilege at common law. Chamberlayne's Best's Evidence, § 583.

2. 1 Greenl. Ev. (7th Ed.), § 254.

wife; and this confidence the law secures by providing that it shall be kept forever inviolable,— that nothing shall be extracted from the bosom of the wife which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce, or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation."[3]

Secrets disclosed in the ordinary course of business, or the confidence of friendship, are not protected.[4]

Courts of justice possess an inherent power of rejecting evidence, which is tendered for the purpose of creating expense, or causing vexation or delay. Such malpractices are calculated to impede the administration of the law, as well as to injure the opposite party.[5]

It has been said that the law excludes, on public grounds, **evidence which is indecent or offensive to public morals**, or injurious to the feelings of third persons. But not only is there no direct authority for such a proposition, but there is authority to the contrary.[6]

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3. See, also, 4 Chamberlayne on Evidence, §§ 2848, 2984, note; Chamberlayne's Best's Evidence, § 586.

4. Chamberlayne's Best's Evidence, § 586.

5. Id., § 587.

6. Id., § 587; Tayl. Ev., § 867.

CHAPTER IX.

AUTHORITY OF RES JUDICATA.

The maxim, "Res judicata pro veritate accipitur," is a branch of the more general one, "Interest reipublicae ut sit finis litium."[1]

In order to have the effect of res judicata, the decision must be that of a court of competent jurisdiction, concurrent or exclusive. The decisions of such tribunals are conclusive until reversed; but no decision is final, unless it be pronounced by a tribunal from which there lies no appeal, or unless the parties have acquiesced in the decision, or the time limited by law for appealing has elapsed. Moreover, the conclusive effect is confined to the point actually decided; and does not extend to any matter which came collaterally in question. It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue.[2]

Such a judgment, with respect to any third person, who was neither party nor privy to the proceeding in which it was pronounced, is only *res inter alios judicata;* and hence the rule, that it **does not bind, and is not in general evidence against any one who was not such party or privy.**[3]

But the judgment of a tribunal of competent jurisdiction may be null and void in itself, in respect of what is contained in it. 1. **When the object of the decision it pronounces is uncertain;** e. g., a judgment condemning the defendant to pay the plaintiff what he owes him would be void, though it would be sufficient if it condemned the defendant to pay what the plaintiff demanded of him, and

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1. Things adjudicated are taken as true. It is to the interest of the state that there be an end of litigation.

2. 10 Co. 76b; Duchess of Kingston's Case, 11 St. Tr. 261; 2 Smith's Lead. Cases, *573 *et seq.* and notes; Chamberlayne's Best's Evidence, § 590 *et seq.*

3. Id.

the cause of demand appeared on the record of the proceedings. 2. **When the object of the adjudication is anything impossible.** 3. **When a judgment pronounces anything which is expressly contrary to the law**; i. e., if it declares that the law ought not to be observed: if it merely decides that the case in question does not fall within the law, though in truth it does so, the judgment is not null, it is only improper, and consequently can only be avoided by the ordinary course of appeal. 4. **When a judgment contains inconsistent and contradictory dispositions.** 5. **When a judgment pronounces on what is not in demand.**[4]

The same principles apply to other things which partake of the nature of judgments. Thus, **a verdict** that finds matter uncertainly or ambiguously is insufficient; and the same holds when it is inconsistent.[5]

Awards.—It is a principle that awards must be certain; and if an award contains inconsistent provisions, or directs what is impossible, or what is illegal, it cannot be enforced by action, and may be set aside on motion.[6]

First, **in order to exclude a party whose demand has been dismissed from making a fresh demand, on the ground that the matter is res judicata, the thing demanded must be the same.** But this must not be understood too literally. For instance, although the flock which the plaintiff demands now does not consist of the same sheep as it did at the time of the former demand, the demand is held to be for the same thing, and therefore is not receivable. And so, a party is held to demand the same thing when he demands anything which forms a part of it. But, secondly, **in order that the maxim res judicata shall apply, there must be "eadem conditio personarum."**[7] And therefore, as we have seen, if the person whom it is sought to affect by a judgment was neither party nor privy to the proceed-

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4. See Chamberlayne's Best's Evidence, § 591 and authorities cited; also, generally, Freeman on Judgments; Black on Judgments.

5. Id.

6. See, generally, Morse on Arbitration & Award; Chamberlayne's Best's Evidence, § 591.

7. The same condition of persons. See Chamberlayne's Best's Evidence, § 592.

ings in which it was given, it is not in general even receivable in evidence against him. So, a judgment against a party in a criminal case is not evidence against him, in a civil suit, even of the fact on which the conviction must have proceeded. Nor is a judgment of acquittal evidence in his favor; for the parties are not the same.[8]

An important **exception** to this rule exists in the case of **judgments in rem**, i. e., adjudications pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose. Such judgments the law has, from motives of policy and general convenience, invested with a conclusive effect against all the world.[9]

Conclusive judgments are a species of estoppels; seeing that they are given in a matter in which the person against whom they are offered as evidence has had, either really or constructively, an opportunity of being heard, and disputing the case of the other side. When judgment has been obtained for a debt, no other action can be maintained upon it while the judgment is in force. Like other estoppels by matter of record, and estoppels by deed, judgments, in order to have a conclusive effect, must be pleaded if there be opportunity; otherwise they are only cogent evidence for the jury.[1]

The general maxims of law, "**Dolus et fraus nemini patrocinentur,**" "**Jus et fraus nunquam cohabitant,**"[2] "**Qui fraudem fit frustra agit,**" apply to the decisions of tribunals. Although it is not permitted to show that the court was mistaken, it may be shown that it was misled. **Fraud** is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. This principle applies to every species of judgment; to judgments of courts of exclusive jurisdiction; to judgments *in rem*;

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8. Id. See, generally, Freeman on Judgments.

9. Castrique v. Imrie, L. R. 4 App. Cas. 429, per Blackburn, J.; Chamberlayne's Best's Evidence, § 593.

1. See, generally, Bigelow on Estoppel and Freeman on Judgments; Chamberlayne's Best's Evidence, § 594.

2. Right and fraud never live together. See Chamberlayne's Best's Evidence, § 595.

to judgments of foreign tribunals; and even to judgments of the House of Lords.[3]

It is perhaps needless to add, that a supposed judicial record offered in evidence may be shown to be a forgery.

3. As to the amount of evidence required to show fraud, see 1 Chamberlayne on Evidence, §§ 1015, 1221 and notes.

CHAPTER X.

PLURALITY OF WITNESSES.

The quantity of legitimate evidence required for judicial decision. In general no particular number of instruments of evidence is necessary for proof or disproof; the testimony of a single witness, relevant for proof of the issue in the judgment of the judge, and credible in that of the jury, is a sufficient basis for decision, both in civil and criminal cases. And, as a corollary from this, when there is conflicting evidence, the jury must determine the degree of credit to be given to each of the witnesses; for the testimony of one witness may, in many cases, be more trustworthy than the opposing testimony of many.[1]

I. Exceptions at common law.

1. Prosecutions for perjury. The rule requiring two witnesses in indictments for perjury applies only to the proof of the falsity of the matter sworn to by the defendant: all preliminary or collateral matters, such as the jurisdiction and sitting of the court, the fact of the defendant having taken the oath, together with the evidence he gave, etc., may be proved in the usual way.[2]

It is not easy to define the precise amount of evidence required from each of the witnesses or proofs in such cases.

In R. v. Parker,[3] Tindal, C. J. thus laid down the rule: "With regard to the crime of perjury, the law says, that, where a person is charged with that offence, it is not enough to disprove what he has sworn by the oath of one other witness; and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstances to supply the place of a second witness, it is

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1. See, generally, Chamberlayne's Best's Evidence, Book 3, pt. 2, ch. 10; 1 Chamberlayne on Evidence, § 294; 2 id., § 987 *et seq.*; Wash. Cr. Law (3d Ed.), 222.

2. 2 Chamberlayne on Evidence, § 289.

3. C. & Marsh., 646.

not enough." Probably the soundest view of this subject is that stated by Erle, C. J., in R. v. Shaw;[4] viz., that the degree of corroborative evidence requisite must be a matter for the opinion of the tribunal which tries the case, which must see that it deserves the name of corroborative evidence.

Where the alleged perjury consists in the defendant having sworn contrary to what he had previously sworn on the same subject, the case is not within the rule we have been considering; and the defendant may be convicted simply upon proof of the contradictory evidence given by him on the two occasions.

2. The next exception is in **the proof of wills attested by more than one witness,** in the manner formerly required by the Statute of Frauds, 29 Car. II., c. 3, s. 5, and now by the 7 Will. IV. & 1 Vict., c. 26, and 15 and 16 Vict., c. 24.[5] The practice under both these statutes is thus stated in Taylor on Evidence (7th ed.), § 1854: "Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary to call one of them; excepting in the case of wills relating to real estate, with respect to which it has for many years been the practice of courts of equity, and is now the practice of all the courts, to require that all the witnesses who are in England, and capable of being called, should be examined. It used to be said that all the subscribing witnesses must be called in order to satisfy the conscience of the Lord Chancellor."

II. **Statutory exceptions.** Of these the most important and remarkable is found in the practice on trials for **high treason and misprision of treason.** The better opinion and weight of authority are strongly in favor of the position, that at the common law a single witness was sufficient in high treason, and *a fortiori* in petty treason or misprision of treason.[6]

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4. 10 Cox C. C. 66, 72.

5. The number of witnesses is prescribed by statute. Consult the local statutes. See Chamberlayne's Best's Evidence, § 611.

6. Section 3 of Article III. of the Constitution of the United States provides that "No person shall be convicted of treason unless on the testimony of two witnesses to the same

The rule requiring two witnesses in treason only applies to the proof of the overt acts of treason charged in the indictment: any collateral matters may be proved as at common law; such as that the accused is a subject of the British Crown, and the like.

3. Another exception to this rule was in the "trial by witnesses," or, as our old lawyers expressed it, "trial by proofs,"—expressions used in our books to designate a few cases which were tried by the judges instead of a jury. It is not easy to fix precisely what these cases were. Such a case was where, on a writ of dower, the tenant pleaded that the husband of the demandant was still living.

4. There seems to be some difference among the authorities as to whether two witnesses were required on a claim of villenage or niefty. If such were the dule, it was a good one *in favorem libertatis;* but it is needless to pursue the inquiry at the present day.

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overt act, or on confession in open court." The statute 7 & 8 Will. III., c. 3, sec. 2, is very similar to the above quoted constitutional provision. See, also, Wash. Cr. Law (3d Ed.), 222; Chamberlayne's Best's Evidence, § 615 and note, p. 569; 2 Chamberlayne on Evidence, § 989.

BOOK IV.

OBSERVATIONS ON FORENSIC PRACTICE, AND RULES FOR EXAMINATION OF WITNESSES.

PART I.

OBSERVATIONS ON FORENSIC PRACTICE.

The rules of evidence, especially such as relate to evidence in causa, are rules of law, which a court or judge has no more right to disregard or suspend than any other part of the common or statute law of the land. **Those which regulate forensic practice are less inflexible**; for although the mode or receiving and extracting evidence is governed by established rules, a discretionary power of relaxing these on proper occasions is vested in the tribunal; and indeed it is obvious that an unbending adherence, under all circumstances, to rules which are the mere *forma et figura judicii,*[1] would impede rather than advance the ends of justice.

CHAPTER I.

PROCEEDINGS PREVIOUS TO TRIAL.

The common law laid down as a maxim, "**Nemo tenetur armare adversarium suum contra se,**"[2] and, in furtherance of this principle, it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause. Either party had the power, however, of filing **a bill in equity for**

1. The form and figure of judgment. Chamberlayne's Best's Evidence, § 623.

2. No one shall be bound to arm his own adversary against himself.

the discovery of evidence, — a process, however, which was alike circuitous and expensive. In modern times the courts of common law took upon themselves to relax considerably the strictness of the ancient rule; and at length it became the established practice, that when a document in which both litigant parties had a joint interest was in the custody or control of one of them, under such circumstances that he might fairly be deemed a trustee of it for both, the court would **order an inspection and copy** of it to be given to his adversary, if it were material to his suit or defence.[3]

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3. See 17 & 18 Vict., c. 125, §§ 50, 58. Consult the statutes at this point for further amendments of the law upon this subject. See, also, *ante*, this volume, Equity, Discovery; Chamberlayne's Best's Evidence, §§ 624-630 and note, p. 580.

CHAPTER II.

TRIAL AND ITS INCIDENTS.

1. **Course of a trial.** The proceedings commence with a short **statement to the jury** of the questions they are about to try. In civil cases this statement is made by the plaintiff, if he appears in person, by his counsel if he appears by counsel, and by his junior counsel if he has more than one, and it is technically termed "**opening the pleadings.**" If there be any question as to **which of the contending parties ought to begin,** the judge decides that question, and the party who has that right then, either by himself or his counsel, states his case to the jury, and afterwards adduces his evidence in support of it. The opposite party is then heard in like order. If he adduces evidence the opener has a right to address the jury in reply. In addressing the jury, a party has no right to state facts which he does not intend to call evidence to prove; and when this rule is violated the judge may, in his discretion, allow a reply. Where a fresh case, i. e., a case not merely answering the case of the party who began, is set up by the responding party, and evidence is adduced to support such fresh case, the party who began may give proof of a rebutting case; his adversary has then a special reply on the new evidence thus adduced, and the opener has a general reply on the whole case.[1]

The party against whom **real or documentary evidence** is adduced has a right to inspect it; and such evidence can be read to or laid before the jury only if no valid objection to it appears. Every witness called is first examined by the party calling him, and this is denominated his "**examination in chief.**" If an objection is made to his competency, he is interrogated as to the necessary facts, and this is called examination on the **voir dire.** The party

1. See *post*, Pleading; Chamberlayne's Best's Evidence, Book 4, pt. 1, c. 2.

against whom any witness is examined has a right to "**cross-examine**" him; after which the party by whom he is called may "**re-examine**" him, but only as to matters arising out of the cross-examination. The court and jury may also put questions to the witnesses, and inspect all media of proof adduced by either side. **The court,** generally speaking, is not only not bound by the rules of practice relative to the manner of questioning witnesses, and the order of receiving proofs, but may in its discretion dispense with them in favor of parties or counsel. During the whole course of the trial, the judge determines all questions of law and practice which arise; and if the admissibility of a piece of evidence depends on any disputed fact, the judge must determine that fact, and for this purpose go into proofs, if necessary.[2]

The common law right of a party to appear by counsel, when that right is accorded to the other side, was long subject to a remarkable **exception,** i. e., in cases of persons indicted or impeached for treason or felony. It was otherwise in prosecutions for misdemeanor, as also in appeals of felony; and even on indictments or impeachments for treason or felony, the exception was confined to cases where the accused pleaded the general issue, and did not extend to preliminary or collateral matter.[3]

II. **Amongst the principal incidents of a trial,** the first which requires particular notice is the practice of **ordering witnesses out of court.** When concert or collusion among witnesses is suspected, or there is reason to apprehend that any of them will be influenced by the statements of counsel, or the evidence given by other witnesses, the ends of justice require that they be examined apart; and the court will, *proprio motu,*[4] or on the application of either party, order all the witnesses, except the one under

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2. See, generally, as to cross-examination, 4 Chamberlayne on Evidence, pp. 4698, 4699, title, Cross-Examination.

3. Now, both in Engand and the United States, every person accused of any crime is entitled as a matter of right to appear and be heard by counsel. Cooley's Const. Lim. (7th Ed.), 474 *et seq.* and notes.

4. Of his own motion.

examination, to leave court. The better opinion seems to be, that this is not demandable *ex debito justitiae;*[5] and there may be cases where it would be judicious to refuse it. It is said that the rule does not extend to the parties in the cause; nor, at least in general, to the solicitors engaged in it. A witness who disobeys such an order is guilty of contempt; but the judge cannot refuse to hear his evidence, although the circumstance is matter of remark to the jury. In order to prevent communication, in such cases, between witnesses who have been examined and those awaiting examination, it is a rule that the former must remain in court until the latter are examined.[6]

2. Next, with respect to **the order of beginning,** or *ordo incipiendi.* This is known in practice as the "right to begin." There are few heads of practice on which a large number of irreconcilable decisions have taken place. In one sense of the word, the plaintiff always begins; for, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But, as it is agreed on all hands that **the order of proving depends on the burden of proof,** if it appears on the statement of the pleadings, or whatever is analogous thereto, that the plaintiff has nothing to prove,— that the defendant has admitted every fact alleged, and takes on himself to prove something which will defeat the plaintiff's claim,— he ought to be allowed to begin, as the burden of proof then lies on him. The authorities on this subject present almost a chaos. Thus much only is certain, that **if the onus of proving the issues, or any one of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin,**[7] and it seems that, if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal or mere matter of computation, here also the defendant may begin.[8] But the difficulty is, where the

5. As a matter of right.

6. See 1 Chamberlayne on Evidence, § 188 *et seq.* and notes.

7. This is believed to be a correct statement of the American practice. See Chamberlayne's Best's Evidence, § 637 *et seq.;* 2 Chamberlayne on Evidence, § 943 *et seq.*

8. See next note, *supra.*

burden of proving the issue, or all the issues if more than one, lies on the defendant, and the onus of proving the amount of damage lies on the plaintiff. A series of cases (not an unbroken series, for there were several authorities the other way), concluding with that of Cotton v. James,[9] in 1829, established the position that the onus of proving damages made no difference, and that under such circumstances the defendant ought to begin.

A rule on the subject was made by the judges, and applied in the cases arising in 1833 and since that time, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant;" and it was stated that the rule was not at all intended to introduce a new practice, but was declaratory or restitutive of the old.

It is new settled, that, where the ruling of the judge with reference to the right to begin is erroneous in the judgment of the court in banc, and "clear and manifest wrong" has resulted from that ruling, a new trial will be granted by the court, not as matter of right, but as matter of judgment.

The right to begin is an advantage to a party who has a strong case and good evidence, as it enables him to make the first impression on the tribunal; and if evidence is adduced by the opposite side, it entitles him to reply, thus giving him the last word. But if the case of a party be a weak one,— if he has only slight evidence, or perhaps none at all, to adduce in support of it,— and goes to trial on the chance (if defendant) of the plaintiff being nonsuited, or that the case of the opposite party may break down through its own intrinsic weakness, or trusting to the effect of an address to the jury, the fact of his having to begin might prove instantly fatal to his cause.[1]

3. We have already referred to the rule of practice which prohibits counsel, or the parties in civil cases, and, in accordance with a recent rule, the counsel for accused parties in criminal cases, from **stating any facts to the**

9. 3 C. & P. 505; 1 Moo. & M. 273.

1. See *supra*, note and authorities therein cited.

jury which they do not intend offering evidence to prove. This must not, however, be understood too literally. A counsel or party has a right to allude to any facts of which the court takes judicial cognizance, or the notoriety of which dispenses with proof. But more difficulty arises with respect to historical facts. A public and general history is receivable in evidence to prove a matter relating to the kingdom at large. But a history is not receivable to prove a private right or particular custom. It has also been held that counsel or a party at a trial may refer to matters of general history, provided the license be exercised with prudence; but cannot refer to particular books of history, or read particular passages from them, to prove any fact relevant to the cause. Also, that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the general course of composition, explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause.[2]

4. **The chief rule of practice relative to the interrogation of witnesses is that which prohibits "leading questions;"** i. e., questions which, directly or indirectly, suggest to the witness the answer he is to give. The rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that **leading questions are allowed in cross-examination, but not in examination in chief.** On all matters, however, which are **merely introductory**, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as otherwise much time would be wasted to no purpose. It is sometimes said, that the test of a leading question is whether an answer to it by "Yes" or "No" would be

2. "Publications resorted to for the purpose of enabling the judge to ascertain a fact of common knowledge, are not in reality evidence at all. They are used merely for the purpose of aiding the 'memory and understanding of the court.'" Chamberlayne on Evidence, 858 *et seq.* and cases cited; Chamberlayne's Best's Evidence, § 640.

conclusive upon the matter in issue; but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable. So, leading questions ought not to be put when it is sought to prove material and proximate circumstances.[3]

There are some **exceptions** to the rule against leading. 1. **For the purpose of identifying persons or things,** the attention of the witnesses may be directly pointed to them. 2. **Where one witness is called to contradict another, as to** expressions used by the latter, but which he denies having used, he may be asked directly, Did the other witness use such and such expressions? 3. **Whenever circumstances show that a witness is either hostile** to that party or unwilling to give evidence, the judge may in his discretion allow the rule to be relaxed. 4. The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from **defective memory**; or 5. From the **complicated nature of the matter** as to which he is interrogated.[4]

5. One of the chief rules of evidence is, that **no evidence ought to be received which does not bear, immediately or mediately, on the matters in dispute.**[5] As a corollary from this, all questions tending to raise **collateral issues,** and all evidence offered in support of such issues, ought to be rejected.

In addition to counter proofs and cross-examination, there are three ways of throwing discredit on the testimony of an adversary's witness.[6] 1. **By giving evidence of his general bad character for veracity,** i. e., the evidence of persons who depose that he is in their judgment unworthy of belief, even though on his oath. And here the

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3. The judge may ask leading questions. 1 Chamberlayne on Evidence, § 539 and cases cited.

4. See next note, *supra;* Chamberlayne's Best's Evidence, § 641 *et seq.* and note, p. 699.

5. Book 3, ch. 1, *ante.*

6. This subject has already been considered, *ante.* See, also, Chamberlayne's Best's Evidence, §§ 130, 263, 644; 4 Chamberlayne on Evidence, §§ 2865, 2866, 3276.

inquiry must be limited to what they know of his general character, on which alone that judgment should be founded; particular facts cannot be gone into. 2. **By showing that he has on former occasions made statements inconsistent with the evidence he has given.** But this is limited to such evidence as is relevant to the cause; for a witness cannot be contradicted on collateral matters. 3. **By proving misconduct connected with the proceedings,** or other circumstances showing that he does not stand indifferent between the contending parties. Thus it may be proved that a witness has been **bribed** to give his evidence, or has offered bribes to others to give evidence for the party whom he favors, or that he has used **expressions of animosity** and revenge towards the party against whom he bears testimony, etc.[7]

6. **With respect to the right of a party to discredit his own witnesses.** It is an established rule of the common law that a party shall not be allowed to give general evidence to discredit his own witness, i. e., general evidence that he is unworthy of belief on his oath. By calling the witness, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it. A party might, however, discredit his own witness collaterally, by adducing evidence to show that the evidence which he gave was untrue in fact.[8]

7. **A power of adjournment of its proceedings** by a judicial tribunal in certain cases, exercised with due caution and discretion, is indispensable to the sound and complete administration of justice. As regards criminal cases, it is said that it is incident to a criminal trial that the court may, for sufficient reason, adjourn it. But this rule seems not to have been recognized in civil cases.[9]

8. **There are two ways of questioning the ruling of a court or judge, on matters of evidence in civil cases.** 1.

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7. Chamberlayne's Best's Evidence, § 644.

8. 2 Phill. Ev. (10th Ed.), 525; Chamberlayne's Best's Evidence, § 645 and note, p. 599.

9. The court may grant adjournments if justice requires it. 1 Chamberlayne on Evidence, §§ 180, 187. See Stat. 17 & 18 Vict., c. 125, sec. 19.

By bill of exceptions founded on the Statute West. 2 (13 Edw. I.), c. 31, stat. 1: "Cum aliquis implacitatus coram aliquibus justiciariis, proponat exceptionem, et petat quod justiciarii eam allocent, quam si allocare noluerint, si ille, qui exceptionem proponet, scribat illam exceptionem et petat quod justiciarii apponant sigilla in testimonium, justiciarii sigilla sua apponant; et si unus apponere noluerit, apponat alius de societate."[1] And if a judge refused to seal a bill of exceptions, the party might have a compulsory writ against him, commanding him to seal it if the fact alleged were truly stated; and if he returned that the fact was untruly stated, when the case was otherwise, an action would lie against him for making a false return.[2]

2. **The improper admission or rejection of evidence was also a ground for an application to the court in banc for a new trial.** And this mode of proceeding was generally adopted in preference to that by bill of exceptions. But the court would often refuse a new trial, even where an undoubted error had been committed by the judge, if they thought that under all the circumstances justice had been done.[3]

As to criminal cases. It is said that bills of exceptions do not lie in such cases, and they are certainly never seen in practice.[4] But the Court of Queen's Bench will grant a new trial in certain cases of misdemeanor, though not in a case of felony.[5] Formerly, when the judge before whom

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1. Where any one impleaded before any of our justices, propounds an exception and asks that the justices allow it, if they will not allow it, if he, who propounds the exception, shall write out that exception and ask that the justices affix their seals in testimony thereof, the justices shall affix their seals; and if one is unwilling to do so, let another of his associates affix it. As to the methods of settling a bill of exceptions, etc., consult the statutes and local works of practice and Powell's Appellate Proceedings, ch. 5. For forms of bills of exceptions, see 3 Burrill's Practice, pp. 48 *et seq.*

2. Changed in England by rule of the Supreme Court.

3. See Graham & Waterman and other works on New Trials.

4. Chamberlayne's Best's Evidence, § 648.

5. In this country, motions for a new trial, settlement of bills of exceptions, and suing out of writs of error are common proceedings in criminal cases.

a criminal cause was tried in the Central Criminal Court, or on circuit, entertained a doubt on any point of law or evidence, he reserved the question for the consideration of the judges of the superior courts, who heard it argued, and, if they thought the accused improperly convicted, recommended a pardon. But the judges sitting in this way had no jurisdiction as a court, and were only assessors to advise the judge by whom the matter was brought before them. By 11 & 12 Vict., c. 78, however, this was altered; and a regular tribunal, consisting of at least five judges, was constituted for the decision of all points reserved on criminal trials by any court of oyer and terminer, or jail delivery, or court of quarter sessions. But neither under the old practice nor under this statute have the parties to a criminal proceeding any *compulsory* means of reviewing the decision of the judge.[6]

6. Consult the recent English statutes.

PART II.

ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

In what follows, the term "**cross-examination**" will be used in the sense of "examination *exadverso;*" i. e., the interrogation by an advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the court.

In dealing with examination *ex adverso,* we propose to consider separately the cases — 1. **Where the evidence of the witness is false in toto.** 2. **Where a portion of it is true, but a false coloring is given** by the witness to the whole transaction to which he deposes,— either by the suppression of some facts, or the addition of others, or both.

I. 1. Of the former of these, the most obvious, though not the most usual case, is where the answers extracted show that the fact deposed to is physically impossible.

2. Cases like the above are, however, necessarily uncommon; in most instances, the exertions of the advocate must be directed to showing the improbability, or at most the moral impossibility, of the fact deposed. The story of Susannah and the Elders in the Apocrypha affords a very early and most admirable example. The two false witnsses were examined out of the hearing of each other: on being asked under what sort of tree the criminal act was done, the first said "a mastic tree," the other "a holm tree." The most usual application of this is in detecting fabricated alibis. These seldom succeed if the witnesses are skilfully cross-examined out of the hearing of each other.

II. Falsehood in toto is far less common than **misrepresentation.** Under this head come, 1. **Exaggeration,** and 2. **Evasion.** Of the various resorts of evasion, the most obvious and ordinary are **generality** and **indistinctness.** "Dolosus versatur in generalibus."[1] Untruthful witnesses, as well as unreflecting persons, commonly use words express-

1. A deceitful person dwells in generalities.

ing complex ideas, and entangle facts with their own conclusions and inferences. The mode of detection here is to elicit by repeated questions what actually did take place, thus, breaking up the complex idea into its component parts, and separating the facts from the inferences. Another form is that of "**equivocation,**" or verbal truth-telling, — a practice much resorted to by witnesses who are regardless of their oaths; as also by others, who delude themselves into the belief that deception in this shape is, in a religious and moral point of view, either not criminal, or criminal in a less degree than actual falsehood. Of this form the commonest is the naswer, "I might have done," to the direct question, "Did you?"— an answer tantamount to an admission.

The maxim, "**Falsus in uno, falsus in omnibus,**"[2] may be pushed too far. Not all the untrue testimony given in courts of justice proceeds from an intention to misstate or deceive. On the contrary, it most usually arises from interest or bias in favor of one party, which exercises on the minds of the witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which they depose. Again, some witnesses have a way of compounding with their consciences,— they will not state positive falsehood, but will conceal the truth, or keep back a portion of it; while others, whose principles are sound, and whose testimony is true in the main, will lie deliberately when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by cross-examination is, however, pretty much the same in all cases; namely, by questioning about matters which lie at a distance, and then showing the falsehood of the direct testimony by comparing it with the facts elicited.

Menacing language and austerity of demeanor are not the most efficacious weapons for overcoming adverse witnesses. For, although there are cases in which they may be employed with advantage, still **in the vast majority of instances a mendacious, an untruthful, or an evasive wit-**

2. False in one thing, false in all.

ness is far more effectually dealt with by keeping him in good humor with himself, and putting him off his guard with respect to the designs of his interrogator. Here, and indeed in examinations *ex adverso* in general, the great art is to conceal especially from the witness the object with which the interrogator's questions are put. One mode of accomplishing this is by questioning the witness on indifferent matters, in order, by diverting his attention, to cause him to forget the answer which it is desired to make him contradict.

But if cross-examination is a powerful engine, it is likewise an extermely dangerous one, very apt to recoil even on those who know how to use it. The young advocate should reflect that, if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth, that he is almost sure to recollect every material circumstance by which it was accompanied; and the more his memory is probed on the subject, the more of these circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses of immaterial circumstances not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirm it. **Nothing can be more suspicious than a long story, told by a number of witnesses, who agree down to the minutest details.** Hence it is a well-known rule, that **a cross-examining advocate ought not, in general, to ask questions the answers to which, if unfavorable, will be conclusive against him,** as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is the man of whom he is speaking. The judicious course is to question him as to surrounding, or even remote matters; his answers respecting which may show that, in the testimony he gave in the first instance, he either spoke falsely, or was mistaken.

A witness who, either from self-importance, a desire to benefit the cause of the opposite party, or any other reason, **displays a loquacious propensity, should be encouraged to talk,** in order that he may either fall into some contradic-

tion, or let drop something that may be serviceable to the party interrogating.

The course of cross-examination to be pursued in each particular cause should be subordinate to the plan which the advocate has formed in his mind for the conduct of it. Writers on the art of war, to which forensic battles have so often been compared, lay down as a principle, that every campaign should be conducted with some definite object in view; or, as they express it, that no army should be without its line of operation. There is, however, this difference, that the line of operation of an army can seldom be changed after fighting has begun, whereas matters transpiring in the course of a trial frequently disclose grounds of attack or defence imperceptible at its outset; the seizing on which, and adapting them to the actual state of things, requires that "ingenio veloci ac mobili, animo praesenti et acri," which Quintilian pronounces so essential to an advocate.

The faculty of interrogating witnesses with effect is unquestionably one of the arcana of the legal profession, and, in most instances at least, can only be attained after years of forensic experience. Cross-examination, or examination *ex adverso,* is the most effective of all means for extracting truth; much perjured testimony is prevented by the dread of it. In direct examination, although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare. For it requires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull, matter of fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible, and effective form.[3]

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3. The student should read Book 4, pt. 2 (above summarized), *in extenso;* also the note to section 663, on p. 614, which contains David Paul Brown's "Golden Rules for the Examination of Witnesses."

"The Art of Cross-Examination," by Francis L. Wellman, of the New York Bar, is a work of great interest and value to the young practitioner and should be read with care.

NEGOTIABLE INSTRUMENTS.

87.

THE NEGOTIABLE INSTRUMENTS LAW.

A GENERAL ACT RELATING TO NEGOTIABLE INSTRUMENTS (BEING AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES ON THAT SUBJECT).[1]

TITLE I.

NEGOTIABLE INSTRUMENTS IN GENERAL.

ARTICLE I.

FORM AND INTERPRETATION.[2]

Section 1. Be it enacted, etc., An instrument to be negotiable must conform to the following requirements:

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1. "Following the example of Great Britain, which in 1882 enacted the Bills of Exchange Act [45 & 46 Victc. 61], many of the States of the Union have enacted the so-called Negotiable Instruments Law. The English act was based upon the Digest of Judge Chalmers, and is for the most part a codification of the law relating to bills, notes, and checks. The history of the American act is as follows: In 1895 in many of the States were passed acts providing for the appointment of Commissioners for the Promotion of Uniformity of Legislation in the United States; and at a conference of commissioners from nineteen States, held in that year, was adopted a resolution requesting the committee on commercial laws to procure a draft of a bill relating to commercial paper, based on the English statute, and on such other sources of information as the committee might deem proper to consult. The committee appointed a sub-committee, which employed Mr. John J. Crawford, of New York City, to make a draft. Upon the completion of the draft by Mr. Crawford, it was revised by the sub-committee, and was then submitted to a conference of the commissioners, which included representatives of fourteen States; and, with certain amedments, was adopted by the commissioners. *The final draft, with slight changes in some jurisdictions, has already become law in forty-seven States, Territories, and possessions of the United States.* It has not been adopted in California, Georgia, Maine, Mississippi, Texas, Porto Rico, and the Panama Canal Zone. The law is in the main declara-

tory in its effect, but makes a few changes, and necessarily changes the law in some jurisdictions on points concerning which a conflict of laws has existed."

We have quoted the above statements from the 4th edition (1914) of the Handbook of the Law of Bills and Notes by Mr. Charles P. Norton.

Inasmuch as the Negotiable Instruments Law has been in substance enacted in forty-seven (47) States, Territories and possessions of the United States, *it is practically the law of the land.* It has therefore been printed in full and the principal variations therefrom pointed out in the notes by references to standard textbooks. We give below a list of the States in which this law is in force, indicating those States in which the section numbering is the same as in the original draft of the bill.

The Negotiable Instruments Law will also be found in full with citations of authorities bearing upon it in "Appendix A" of Eaton & Gilbert's Commercial Paper.

The following is a list of the jurisdictions which have adopted the law:

Alabama. Jan. 1, 1908. Code 1907, ch. 115; Laws 1909, p. 126.

Alaska. Apr. 28, 1913. Laws 1913, ch. 64. Section numbering same as in N. I. L.

Arizona. Sept. 1, 1901. Rev. St. 1901, tit. 49.

Arkansas. Apr. 23, 1913. Laws 1913, Act 81. Section numbering same as in N. I. L.

Colorado. Apr. 20, 1897. Rev. St. 1908, ch. 95.

Connecticut. Apr. 5, 1897. Gen. St. 1902, tit. 33, ch. 234.

Delaware. Jan. 1, 1912. Laws 1911, ch. 191. Section numbering same as in N. I. L.

District of Columbia. Apr. 3, 1889. Code of Laws, ch. 46; U. S. Stat. vol. 30, p. 785.

Florida. June 1, 1897. Gen. St. 1906, 4th div., tit. 5, ch. 2.

Hawaii. Apr. 20, 1907. Laws 1907, Act 89. Section numbering same as in N. I. L.

Idaho. March 10, 1903. Rev. Codes 1908, tit. 13, p. 1326.

Illinois. June 5, 1907. Rev. St. 1911, ch. 98.

Indiana. March 3, 1913. Laws 1913, ch. 63. Section numbering same as in N. I. L.

Iowa. Apr. 12, 1902. Code Supp. 1907, tit. 15, p. 729. Section numbering same as in N. I. L.

Kansas. June 8, 1905. Gen. St. 1909, ch. 84.

Kentucky. March 24, 1904. Statutes 1909 (Carroll) ch. 90 B, section 3720 B.

Louisiana. June 29, 1904. Laws 1904, Act 64. Section numbering same as in N. I. L.

Maryland. March 29, 1898. Ann. Civ. Code 1910, art. 13.

Massachusetts. Jan. 1, 1899. Rev. Laws 1902, ch. 73.

Michigan. June 16, 1905. Pub. Acts 1905, Act 265.

Minnesota. July 1, 1913. Laws 1913, ch. 272; Gen. St. 1913, p. 1291. Section numbering same as in N. I. L.

Missouri. Apr. 10, 1905. Rev. St. 1909, ch. 86, p. 3122.

Montana. March 7, 1903. Civ. Code 1907, tit. 15, p. 1593.

Nebraska. Aug. 1, 1905. Rev. St. 1913, ch. 54.

Nevada. May 1, 1907. Rev. Laws 1912, vol. 1, p. 769.

New Hampshire. Jan. 1, 1910. Laws 1909, ch. 123.

New Jersey. Apr. 4, 1902. Comp.

1. **It must be in writing** and signed by the maker or drawer.[3]
2. **Must contain an unconditional promise or order to pay** a sum certain in money.[4]
3. **Must be payable on demand, or at a fixed or determinable future time.**[5]
4. **Must be payable to order or to bearer;**[6] and,
5. Where the instrument is addressed to a **drawee,** he **must be named** or otherwise indicated therein with reasonable certainty.[7]

Sec. 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid —

St. 1910, vol. 3, p. 3732. Section numbering same as in N. I. L.

New Mexico. March 21, 1907. Laws 1907, ch. 83. Section numbering same as in N. I. L.

New York. May 19, 1897. Consol. Laws, ch. 38.

North Carolina. March 8, 1899. Rev. 1905, ch. 54.

North Dakota. March 7, 1899. Rev. Codes 1905 (Civ. Code) ch. 90.

Ohio. Jan. 1, 1903. Gen. Code 1910, pt. 2, tit. 7, div. 2, p. 1717.

Oklahoma. March 20, 1909. Rev. Laws 1910, ch. 49.

Oregon. Feb. 16, 1899. Gen. Laws 1910 (L. O. L.) tit. 40, ch. 2, p. 2128.

Pennsylvania. Sept. 2, 1901. Laws 1901, p. 194. Section numbering same as in N. I. L.

Philippines. Feb. 3, 1911. War Dept. Annual Reports 1911, vol. 4, p. 39 (Acts Philippine Com'n 1911, No. 2031). Section numbering same as in N. I. L.

Rhode Island. July 1, 1899. Gen. Laws 1909, tit. 19, ch. 200.

South Carolina. March 4, 1914. Acts 1914, Act 396, p. 668. Section numbering same as in N. I. L.

South Dakota. March 4, 1913. Comp. Laws 1913, vol. 2, p. 298.

Tennessee. May 16, 1899. Code Supp. 1897-1903, p. 571.

Utah. July 1, 1899. Comp. Laws 1907, tit. 53, p. 629.

Vermont. June 1, 1913. Laws 1912, Act 99. Section numbering same as in N. I. L.

Virginia. March 3, 1898. Code 1904, ch. 133a, § 2841a. Section numbering same as in N. I. L.

Washington. March 22, 1899. Rem. & Bal. Code, 1910, tit. 19, ch. 3.

West Virginia. Jan. 1, 1908. Acts 1907, ch. 81. Section numbering same as in N. I. L.

Wisconsin. May 15, 1899. Statutes of 1913, ch. 78.

Wyoming. Feb. 15, 1905. Comp. St. 1910, ch. 210.

2. For definitions see *post,* title 2, art. 1, and title 3, art. 1.

3. It may (except the signature) be in whole or in part printed, or in writing with ink or in pencil, Eaton & Gilbert Commercial Paper, 162.

It must be signed; as to what constitutes signing, see id.

4. See Eaton & Gilbert Com. Pap. 168.

5. Id. 208.

1. **With interest**; or
2. **By stated instalments**; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due; or
4. **With exchange**, whether at a fixed rate or at the current rate; or
5. **With costs** of collection or an attorney's fee, in case payment shall not be made at maturity.[8]

Sec. 3. **An unqualified order or promise to pay** is unconditional within the meaning of this act, though coupled with —

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.[9]

Sec. 4. **An instrument is payable at a determinable future time, within the meaning of this act,** which is expressed to be payable —

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.[1]

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.[2]

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6. Id. 221.

7. See Eaton & Gilb. Com. Pap. 15.

8. See, generally, as to all the above items, Eaton & Gilb. Com. Paper, 198 *et. seq.* Hereafter Eaton & Gilbert in Commercial Paper, published in 1903, by Matthew Bender & Co. of Albany, N. Y., will be cited as "Eaton & Gilb."

9. See Eaton & Gilb. 182 *et seq.*

1. See, as to above items, Eaton & Gilb. 208 *et seq.*

2. Eaton & Gilb. 175 *et seq.*

Sec. 5. **An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.**[3] But the negotiable character of an instrument otherwise negotiable is not affected by a provision which —

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.[4]

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Sec. 6. **The validity and negotiable character of an instrument** are not affected by the fact that —

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable;[5] or
4. Bears a seal;[6] or
5. Designates a particular kind of current money in which payment is to be made.[7]

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Sec. 7. **An instrument is payable on demand:**

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed

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3. Id. 175.

4. See, as to above items, id. 182 *et seq.*

5. See, as to the above three items, Eaton & Gilb. 241.

6. See id. 244.

7. See id. 188-198.

when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.[8]

Sec. 8. **The instrument is payable to order where** it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of —

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.[9]

Sec. 9. **The instrument is payable to bearer** —

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.[1]

Sec. 10. **The instrument need not follow the language of this act,** but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Sec. 11. **Where the instrument or an acceptance or any indorsement thereon is dated,** such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.[2]

Sec. 12. The instrument is not invalid for the reason only

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8. See, as to above items, Eaton & Gilb. 209 *et seq.*

9. See, as to all the above items, Eaton & Gilb. 223 *et seq.*

1. See, as to above items, id. 231 *et seq.*

2. See Eaton & Gilb. 246.

that it is **ante-dated or post-dated,** provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.[3]

Sec. 3. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.[4]

Sec. 14. **Where the instrument is wanting in any material particular,** the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.[5]

Sec. 15. **Where an incomplete instrument has not been delivered** it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.[6]

Sec. 16. **Every contract on a negotiable instrument is incomplete and revocable until delivery of** the instrument for the purpose of giving effect thereto. As between immediate

3. See id. 246.
4. See id. 248.
5. See id. 249, 253.
6. See id. 253.

parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.[7]

Sec. 17. **Where the language of the instrument is ambiguous or there are omissions therein,** the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.[8]
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated from the issue thereof.[9]
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.[1]
4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail.[2]
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election.[3]
6. Where a signature is so placed upon the instrument

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7. See id. 254.
8. See id. 262.
9. See id. 264.
1. See id. 265.
2. See id. 266.
3. See id. 266.

that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.[4]

7. Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.[5]

Sec. 18. **No person is liable on the instrument whose signature does not appear thereon,** except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.[6]

Sec. 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.[7]

Sec. 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.[8]

Sec. 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.[9]

Sec. 22. **The indorsement or assignment of the instrument** by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.[1]

Sec. 23. **When a signature is forged** or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment

4. See id. 266.
5. See id. 267, 268.
6. See id. 268.
7. See id. 82.
8. See id. 82, 83.
9. See id. 83, 98.
1. See Eaton & Gilb. 51.

thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.[2]

ARTICLE II.

CONSIDERATION.

Sec. 24. **Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration**; and every person whose signature appears thereon to have become a party thereto for value.[3]

Sec. 25. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.[4]

Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.[5]

Sec. 27. **Where the holder has a lien on the instrument,** arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.[6]

Sec. 28. **Absence or failure of consideration** is matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.[7]

Sec. 29. **An accommodation party** is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.[8]

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2. See id. 565 *et seq.*
3. See id. 301.
4. See id. 287.
5. See id. 271 *et seq.*
6. See id. 287.
7. See id. 275.
8. See Eaton & Gilb. 433.

ARTICLE III.

NEGOTIATION.

Sec. 30. **An instrument is negotiated** when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.[9]

Sec. 31. **The indorsement must be written** on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.[1]

Sec. 32. **The indorsement must be an indorsement of the entire instrument.** An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.[2]

Sec. 33. **An indorsement may be either special or in blank**; and it may also be either restrictive or qualified, or conditional.[3]

Sec. 34. **A special indorsement** specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.[4]

Sec. 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.[5]

Sec. 36. **An indorsement is restrictive,** which either—

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or

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9. See Eaton & Gilb. 316 *et seq.*
1. See id. 319, 320.
2. See id. 323.
3. See id. 324.
4. See Eaton & Gilb. 325.
5. See id. 326.

3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.[6]

Sec. 37. **A restrictive indorsement confers upon the indorsee the right** —

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.[7]

Sec. 38. **A qualified indorsement** constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.[8]

Sec. 39. **Where an indorsement is conditional,** a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.[9]

Sec. 40. **Where an instrument, payable to bearer, is indorsed specially,** it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.[9a]

Sec. 41. **Where an instrument is payable to the order of two or more payees or indorsees** who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.[1]

Sec. 42. **Where an instrument is drawn or indorsed to a**

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6. See id. 328.
7. See id. 328 332.
8. See id. 333-336.
9. See Eaton & Gilb. 336, 337.
9a. See id. 338.
1. See id. 338.

person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer[2]

Sec. 43. **Where the name of a payee or indorsee is wrongly designated or misspelled,** he may indorse the instrument as therein described, adding, if he think fit, his proper signature.[3]

Sec. 44. **Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.**[4]

Sec. 45. **Except where an indorsement bears date after the maturity** of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.[5]

Sec. 46. Except where the contrary appears, every indorsement is **presumed prima facie to have been made at the place** where the instrument is dated.[6]

Sec. 47. **An instrument negotiable in its origin** continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.[7]

Sec. 48. **The holder may at any time strike out any indorsement which is not necessary to his title.** The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.[8]

Sec. 49. **Where the holder of an instrument payable to his order transfers it for value** without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.[9]

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2. See id. 339.
3. See id. 341.
4. See id. 341.
5. See id. 342.
6. See id. 343.
7. See id. 343.
8. See Eaton & Gilb. 346.
9. See id. 347.

Sec. 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.[1]

ARTICLE IV.

RIGHTS OF THE HOLDER.

Sec. 51. **The holder of a negotiable instrument may sue thereon in his own name**; and payment to him in due course discharges the instrument.[2]

Sec. 52. **A holder in due course** is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.[3]

Sec. 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.[4]

Sec. 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.[5]

Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, **by fraud**,

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1. See id. 352.
2. See id. 358.
3. See, as to above items, id. 359 *et seq.*
4. See Eaton & Gilb. 367.
5. See id. 373.

duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.[6]

Sec. 56. **To constitute notice of an infirmity** in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.[7]

Sec. 57. **A holder in due course holds the instrument free from any defect of title of prior parties,** and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.[8]

Sec. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.[9]

Sec. 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he clai macquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.[1]

ARTICLE V.

LIABILITIES OF PARTIES.

Sec. 60. **The maker of a negotiable instrument by making it engages** that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.[2]

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6. See id. 374.
7. See id. 368.
8. See id. 381.
9. See id. 387.
1. See Eaton & Gilb. 390, 391.
2. See id. 399.

Sec. 61. **The drawer by drawing the instrument admits** the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.[3]

Sec. 62. **The acceptor by accepting the instrument engages** that he will pay it according to the tenor of his acceptance; and admits—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.[4]

Sec. 63. **A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor,** is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.[5]

Sec. 64. **Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser,** in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.[6]

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3. See id. 403.
4. See id. 406 *et seq.*
5. See id. 412.
6. See Eaton & Gilb. 413.

Sec. 65. **Every person negotiating an instrument by delivery or by a qualified indorsement, warrants—**

1. That the instrument is genuine and in all respects what it purports to be.
2. That he has a good title to it.
3. That all prior parties had capacity to contract.
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.[7]

Sec. 66. **Every indorser who indorses without qualification, warrants to all subsequent holders in due course:**

1. The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.[8]

Sec. 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.[9]

Sec. 68. **As respects one another, indorsers are liable prima facie in the order in which they indorse**; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.[1]

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7. See id. 418 *et seq.*
8. See Eaton & Gilb. 424 *et seq.*
9. See id. 429.
1. See id 430.

Sec. 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.[2]

ARTICLE VI.

PRESENTMENT FOR PAYMENT.

Sec. 70. **Presentment for payment** is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.[3]

Sec. 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.[4]

Sec. 72. **Presentment for payment, to be sufficient, must be made—**

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place as herein defined.
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.[5]

Sec. 73. **Presentment for payment is made at the proper place—**

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2. See id. 432.
3. See id. 439.
4. See id. 445.
5. See Eaton & Gilb. 449.

1. Where a place of payment is specified in the instrument and it is there presented.
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.[6]

Sec. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.[7]

Sec. 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.[8]

Sec. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative is such there be, and if, with the exercise of reasonable diligence, he can be found.[9]

Sec. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.[1]

Sec. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.[2]

Sec. 79. Presentment for payment is not required in

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6. See id. 453.
7. See id. 457.
8. See id. 459.
9. See Eaton & Gilb. 461.
1. See id. 461, 462.
2. See id. 463.

order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.[3]

Sec. 80. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented..[4]

Sec. 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.[5]

Sec. 82. **Presentment for payment is dispensed with:**

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made.
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.[6]

Sec. 83. **The instrument is dishonored by non-payment** when,—

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.[7]

Sec. 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.[8]

Sec. 85. **Every negotiable instrument is payable at the time fixed therein without grace.** When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder,

3. See id. 464.
4. See id. 466.
5. See id. 467.
6. See id. 468.
7. See Eaton Gilb. 472, 473.
8. See id. 473.

be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.[9]

Sec. 86. **Where the instrument is payable at a fixed period after date, after sight,** or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.[1]

Sec. 87. **Where the instrument is made payable at a bank** it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.[2]

Sec. 88. **Payment is made in due course** when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.[3]

ARTICLE VII.

NOTICE OF DISHONOR.

Sec. 89. **Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser,** and any drawer or indorser to whom such notice is not given is discharged.[4]

Sec. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.[5]

Sec. 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.[5a]

Sec. 92. Where notice is given by or behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties, who have a right of recourse against the party to whom it is given.[6]

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9. See id. 474 *et seq.*
1. See id. 479.
2. See id. 480.
3. See id. 483.
4. See id. 485.
5. See Eaton & Gilb. 493.
5a. See id. 495.
6. See id. 497.

Sec. 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.[7]

Sec. 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.[8]

Sec. 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.[9]

Sec. 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.[1]

Sec. 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.[2]

Sec. 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.[3]

Sec. 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.[4]

Sec. 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.[5]

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7. See id. 498.
8. See id. 497.
9. See id. 498.
1. See id. 500.
2. See id. 489.
3. See Eaton & Gilb. 490.
4. See id. 491.
5. See id. 492.

Sec. 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or asignee.[6]

Sec. 102. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.[7]

Sec. 103. **Where the person giving and the person to receive notice reside in the same place,** notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.[8]

Sec. 104. **Where the person giving and the person to receive notice reside in different places,** the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.[9]

Sec. 105. **Where notice of dishonor is duly addressed and deposited in the post-office,** the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.[1]

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6. See id. 493.
7. See id. 502.
8. See id. 505, 506.
9. See Eaton & Gilb. 506 *et seq.*
1. See id. 515.

Sec. 106. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.[2]

Sec. 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.[3]

Sec. 108. **Where a party has added an address to his signature, notice of dishonor must be sent to that address**; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or
2. If he live in one place, and have his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.[4]

Sec. 109. **Notice of dishonor may be waived**, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.[5]

Sec. 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.[6]

Sec. 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.[7]

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2. See id. 516.
3. See id. 509-511.
4. See id. 517.
5. See id. 517 *et seq.*
6. See id. 524.
7. See Eaton & Gilb. 525.

Sec. 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.[8]

Sec. 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.[9]

Sec. 114. **Notice of dishonor is not required to be given to the drawer in either of the following cases:**

1. Where the drawer and drawee are the same person.
2. When the drawee is a fictitious person or a person not having capacity to contract.
3. When the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment.[1]

Sec. 115. **Notice of dishonor is not required to be given to an indorser in either of the following cases:**

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted for his accommodation.[2]

Sec. 116. Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted.[3]

Sec. 117. An omission to give notice of dishonor by non-

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8. See id. 526.
9. See id. 504.
1. See id. 528.
2. See id. 529.
3. See Eaton & Gilb. 530.

acceptance does not prejudice the rights of a holder in due course subsequent to the omission.[4]

Sec. 118. Where any negotiable instrument has bee dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.[5]

ARTICLE VIII.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

Sec. 119. **A negotiable instrument is discharged:**

1. **By payment** in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. **By the intentional concellation** thereof by the holder.
4. **By any other act which will discharge a simple contract** for the payment of money.
5. **When the principal debtor becomes the holder** of the instrument at or after maturity in his own right.[6]

Sec. 120. **A person secondarily liable on the instrument is discharged:**

1. **By any act which discharges the instrument.**
2. **By the intentional cancellation** of his signature by the holder.
3. **By the discharge of a prior party.**
4. **By a valid tender of** payment made by a prior party.
5. **By a release of the principal debtor,** unless the holder's right of recourse against the party secondarily liable is expressedly reserved.
6. **By any agreement binding upon the holder to extend the time of payment,** or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the

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4. See id. 530.
5. See id. 530.
6. See id. 532 *et seq.*

right or recourse against such party is expressly reserved.[7]

Sec. 121. **Where the instrument is paid by a party secondarily liable thereon, it is not discharged**; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.[8]

Sec. 122. **The holder may expressly renounce his rights** against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.[9]

Sec. 123. **A cancellation made unintentionally**, or under a mistake or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.[1]

Sec. 124. **Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided**, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.[2]

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the

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7. See Eaton & Gilb. 544.
8. See id. 552.
9. See id. 542.
1. See id. 541.
2. See Eaton & Gilb. 543, 556.

alteration, he may enforce payment thereof according to its original tenor.[3]

Sec. 125. Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number or the relations of the parties.
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.[4]

TITLE II.—BILLS OF EXCHANGE.

ARTICLE I.

FORM AND INTERPRETATION.

Sec. 126. **A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.**[5]

Sec. 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.[6]

Sec. 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.[7]

Sec. 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the con-

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3. See id. 556, 557.
4. See, as to all the above items, id. 560 *et seq.*
5. See Eaton & Gilb. 576.
6. See id. 578.
7. See id. 580.

trary appears on the face of the bill, the holder may treat it as an inland bill.[8]

Sec. 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.[9]

Sec. 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.[1]

ARTICLE II.

ACCEPTANCE.

Sec. 132. **The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.** The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.[2]

Sec. 133. the holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused may treat the bill as dishonored.[3]

Sec. 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.[4]

Sec. 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.[5]

Sec. 136. The drawee is allowed twenty-four hours after

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8. See Eaton & Gilb. 581.
9. See id. 581.
1. See id. 581, 582.
2. See id. 593, 594.
3. See id. 596.
4. See id. 596.
5. Eaton & Gilb. 596 *et seq.*

presentment, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.[6]

Sec. 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.[6a]

Sec. 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.[7]

Sec. 139. **An acceptance is either general or qualified.** A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.[8]

Sec. 140. **An acceptance to pay at a particular place is a general acceptance,** unless it expressly states that the bill is to be paid there only and not elsewhere.[9]

Sec. 141. **An acceptance is qualified, which is:**

1. **Conditional,** that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated.
2. **Partial,** that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. **Local,** that is to say, an acceptance to pay only at a particular place.
4. **Qualified as to time.**
5. **The acceptance of some one or more of the drawees, but not of all.**[1]

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6. See id. 601.
6a. See id. 602.
7. See id. 603.
8. See id. 604.
9. See id. 605.
1. See, as to all above items, Eaton & Gilb. 605 *et seq.*

Sec. 142. **The holder may refuse to take a qualified acceptance,** and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.[2]

ARTICLE III.

PRESENTMENT FOR ACCEPTANCE.

Sec. 143. **Presentment for acceptance must be made:**

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.[3]

Sec. 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.[4]

Sec. 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who

2. See id. 608.
3. See id. 585, 586.
4. See id. 587.

are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.[5]

Sec. 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.[6]

Sec. 147. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.[7]

Sec. 148. **Presentment for acceptance is excused**, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.
2. Where, after the exercise of reasonable diligence, presentment cannot be made.
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.[8]

Sec. 149. **A bill is dishonored by non-acceptance:**

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5. See, as to all the above items, Eaton & Gilb. 588.
6. See id. 590.
7. See id. 590.
8. See id. 590, 591.

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
2. When presentment for acceptance is excused, and the bill is not accepted.[9]

Sec. 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.[1]

Sec. 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.[2]

ARTICLE IV.

PROTEST.

Sec. 152. **Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance,** and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.[3]

Sec. 153. **The protest must be annexed to the bill,** or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify—

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.[4]

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9. See Eaton & Gilb. 591.
1. See id. 592.
2. See id. 592.
3. See id. 608 *et seq.*
4. See, as to all above items, id. 611 *et seq.*

Sec. 154. **Protest may be made by—**

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.[5]

Sec. 155. **When a bill is protested, such protest must be made on the day of its dishonor,** unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.[6]

Sec. 156. **A bill must be protested at the place where it is dishonored,** except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.[7]

Sec. 157. A bill which has been protested for non-acceptance may be **subsequently protested** for non-payment.[8]

Sec. 158. **Where the acceptor has been adjudged a bankrupt** or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.[9]

Sec. 159. **Protest is dispensed with by any circumstances which would dispense with notice of dishonor.** Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.[1]

Sec. 160. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.[2]

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5. See ditto, id. 615.
6. See id. 616.
7. See id. 617.
8. See id. 618.
9. See id. 618.
1. See id. 619.
2. See id. 619.

ARTICLE V.

ACCEPTANCE FOR HONOR.

Sec. 161. **Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable** thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.[3]

Sec. 162. An acceptance for honor supra protest **must be in writing,** and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.[4]

Sec. 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.[5]

Sec. 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.[6]

Sec. 165. The acceptor for honor, by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.[7]

Sec. 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.[8]

Sec. 167. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented

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3. See Eaton & Gilb. 620.
4. See id. 621.
5. See id. 622.
6. See id. 622.
7. See id. 622.
8. See id. 623.

for payment to the acceptor for honor or referee in case of need.[9]

Sec. 168. **Presentment for payment to the acceptor for honor must be made as follows:**

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.[1]

Sec. 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.[2]

Sc. 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE VI.

PAYMENT FOR HONOR.

Sec. 171. **Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor** of any person liable thereon or for the honor of the person for whose account it was drawn.[3]

Sec. 172. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.[4]

Sec. 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.[5]

Sec. 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment

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9. See id. 623.
1. See, as to all above items, Eaton & Gilb. 624.
2. See id. 624.
3. See id. 625.
4. See id. 625.
5. See id. 625.

will discharge most parties to the bill is to be given the preference.[6]

Sec. 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.[7]

Sec. 176. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.[8]

Sec. 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.[9]

ARTICLE VII.

BILLS IN A SET.

Sec. 178. **Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.**[1]

Sec. 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.[2]

Sec. 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.[3]

Sec. 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated

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6. See id. 626.
7. See id. 626.
8. See id. 626.
9. See Eaton & Gilb. 627.

1. See id. 16, 582.
2. See id. 582.
3. See id. 583.

to different holders in due course, he is liable on every such part as if it were a separate bill.[4]

Sec. 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.[5]

Sec. 183. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.[6]

TITLE III.—PROMISSORY NOTES AND CHECKS.

ARTICLE I.

Sec. 184. **A negotiable promissory note within the meaning of this act is an unconditional promise in writing** made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.[7]

Sec. 185. **A check is a bill of exchange drawn on a bank payable on demand.** Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.[8]

Sec. 186. **A check must be presented for payment within a reasonable time** after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.[9]

Sec. 187. **Where a check is certified** by the band on which it is drawn, the certification is equivalent to an acceptance.[1]

Sec. 188. Where the holder of a check procures it to be

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4. See id. 583.
5. See id. 583.
6. See id. 584.
7. See Eaton & Gilb. 17, 18.
8. See id. 28, 628.
9. See id. 630.
1. See id. 633.

accepted or certified the drawer and all indorsers are discharged from liability thereon.[2]

Sec. 189. **A check of itself does not operate as an assignment** of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.[3]

TITLE IV.—GENERAL PROVISIONS.

ARTICLE I.

Sec. 190. **This act shall be know as the Negotiable Instruments Law.**

Sec. 191. In this act, unless the context otherwise requires—

"**Acceptance**" means an acceptance completed by delivery or notification.[4]

"**Action**" includes counterclaim and set-off.

"**Bank**" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"**Bearer**" means the person in possession of a bill or note which is payable to bearer.

"**Bill**" means bill of exchange, and "note" means negotiable promissory note.

"**Delivery**" means transfer of possession, actual or constructive, from one person to another.

"**Holder**" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"**Indorsement**" means an indorsement completed by delivery.[5]

"**Instrument**" means negotiable instrument.

"**Issue**" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

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2. See id. 635.
3. See id. 636.
4. See Eaton & Gilb. 592 *et seq.*
5. See id. 318 *et seq.*

"**Person**" includes a body of persons, whether incorporated or not.

"**Value**" means valuable consideration.

"**Written**" includes printed, and "writing" includes print.[6]

Sec. 192. **The person "primarily" liable** on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

Sec. 193. **In determining what is a "reasonable time"** or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.[7]

Sec. 194. **Where the day,** or the last day, for doing any act herein required or permitted to be done **falls on Sunday** or on a holiday, the act may be done on the next succeeding secular or business day.[8]

Sec. 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Sec. 196. In any case not provided for in this act the rules of the law merchant shall govern.[9]

Sec. 197. Of the laws enumerated in the schedules hereto annexed that portion specified in the last column is repealed.

Sec. 198. This chapter shall take effect on

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6. See id. 162.
7. See Eaton & Gilb. 502, 503.
8. See id. 474.
9. See, generally, Eaton & Gilbert on Commercial Paper (1903).

PARTNERSHIP.

A DIGEST OF THE LAW OF PARTNERSHIP.

PART I.

THE CONTRACT OF PARTNERSHIP.

CHAPTER I.

WHO ARE PARTNERS.

ARTICLE I.

DEFINITION OF PARTNERSHIP.[1]

Partnership is the relation which subsists between persons who have agreed to combine their property, labor or

1. As it is important to have a correct understanding of the term partnership, we repeat here the observations of Mr. Justice Lindley on the subject, together with a number of definitions by various learned authors. See 1 Lindley, Part. Introduction.

"To frame a definition of any legal term which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not justly be taken. All that they can usefully attempt is to analyze the meaning of the words they use, and to take care not to employ the same word in different senses where so to do can possibly lead to confusion."

"An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term.

"Partnership, although often called a contract, is in truth the result of a contract; the relation which subsists between persons who have agreed to share the profits of some business rather than the agreement to share such profits. [See the definitions, Gilmore on Partnership, 1-4].

"Although for the reasons already stated the writer has not attempted to give a definition of the term partnership, he appends for the consideration of the reader the following definitions taken from works of celebrity:"

Civil Code of New York.—Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them.

Code civil.—Le societe est un contrat, par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de parager le benfice qui pourra en resulter.

Collyer.—[Partnersip as between the parties themselves is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business or adventure.]

Dixon.—A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purpose of joint profit.

Domat.—La societe est une convention entre deux ou plusieurs personnes, parlaquelle ils mettent en commun entre eux ou tous leurs biens ou une partie, ou quelque commerce, quelque ouvrage, ou quelque autre affaire, pour partager tous ce qu'ils pourront avoir de gain on souffrir de perte de ce qu'ils auront mis en societe.

Kent.—Partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions.

Indian contract act.—Partnership is the relation which subsists between persons who have agreed to combine their property, labor or skill in some business, and to share the profits thereof between them.

Parsons.—Partnership is the combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit.

Pollock.—Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them.

Pothier (1).—Le contrat de societe est un contrat par lequel deux ou plusieurs personnes mettent, ou s'obligert de mettre, en commun quelque hose, pourfaire en commun un profit honnete, dont ils s'obligent reciproquement de se rendre compte.

Pothier (2).—Societas est contractus de conferendis bona fide rebus aut operis, animo lucri quod honestum sit ac licitum in commune faciendi.

Prussian code.—Ein Vertrag durch welchen mehrere Personen ihr Vermogen oder Gewerbe oder auch ihr Arbeiten und Bemuhungenganz oder zum Theil zur Erlangung eines gemeinschaftlichen Endzwecks vereinigen, wird ein Gesellschaftsvertrag genannt.

Pufendorf.—Le contrat de societe se fait lorsque deux ou plusieurs personnes mettent en commun leur argent, leurs biens, ou leur travail, a la charge de partager entr'eux le gain et de supporter les pertes qui en arriveront, chacun a proportion de ce qu'il contribue du sien.

skill in some business, and to share the profits thereof between them.[2]

This is the definition given by the Indian Contract Act. A number of others are collected from various English and other sources at the beginning of Mr. Justice Lindley's work. It is there said that most of them are, with reference to English law, too wide, as including corporations and joint-stock companies, which are not subject to the ordinary law of partnership. But it seems hardly satisfactory to say that the members of such bodies are not partners at all; for the analogy of partnership law does apply to them for some purposes, and those not unimportant ones—as, for instance, when questions arise as to the power of majorities to

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Rutherford.—When two or more persons join money, or goods, or labor, or all of these together, and agree to give each other a common claim upon such joint stock, this is partnership.

Story.—Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.

Thibaut.—Verbinden sich mehrere zur Erreichung eines ihnen gemeinschaftlichen Endzwecks so wird diesz ein Gesellschaftsvertrag (*societas* Mascopei Magenschaft) genannt. Geschieht diese Verbindung zu eigennutzigen Zwecken so nennt man sie *societas quoestuaria* oder *negotiatoria*, sonst aber *non quoestuaria*.

Vinnius.—Societas est contractus, quo inter aliquos res aut operae communicantur, lucri in commune faciendi gratia.

Voet.—Societas est contracturs jurisgentium, bonae fidei, consensu constans semper re honesta, de lucri et damni communione.

Watson.—Partnership is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade.

"All the above definitions, [resumes Mr. Justice Lindley] however, with the exception of Mr. Dixon's, are, with reference to the law of England, too wide; for they include not only partnerships in the proper sense of the word, but also many corporations and companies which differ from partnerships in several important respects, and which it is better therefore not to denote by the same word. Mr. Dixon's definition avoids this error, but the relation of principals to which he refers is not altogether free from objection.

"If partnership is defined so widely as to include incorporated and other companies, partnerships must be subdivided into (1) ordinary and (2) extraordinary partnerships as in the Indian Contract Act. But it is more in accordance with ordinary usage to confine the word to unincorporated societies not governed by any special statute or custom."

2. I. C. A. s. 239; Gilm. Part. 3.

bind dissenting members. And, on the whole, it seems best to follow the example of the Indian Act, and, instead of excluding these associations from the category of partnerships, treat them as "extraordinary partnerships," regulated by special legislation.[3]

The nearest approach to a definition which has been given by judicial authority in England is the statement that, "to constitute a partnership, the parties must have agreed to carry on business and to share the profits in some way in common;"[4] where "profits" means the excess of returns over outlay. This principle at once excludes several kinds of transactions which, at first sight, have some appearance of partnership.

What is not Partnership—Common Ownership.

The common ownership of any property does not of itself create any partnership between the owners; moreover, there may be an agreement as to the management and use of the property, and the application of the produce or gains derived from it, without any partnership arising.[5] On the other hand, there may be a part ownership without partnership in the property itself, together with a real partnership in the business of managing it for the common benefit.[6]

Sharing Gross Returns.

The sharing of gross returns, with or without a common interest in property from which the returns come, does not of itself create any partnership. Thus, an agent paid by commission on his receipts is not thereby made a partner of his employers; and if the proprietor of a theatre lets it to a manager who finds the acting company, on the terms of the proprietor providing for the general service and expenses of the theatre, and the gross receipts being equally divided, the proprietor's share of receipts is merely a substitute for rent, and his taking it does not make him in any sense a partner with the manager.[7]

And, not only can there be no partnership without a sharing of profits, but it is now clear law, though formerly it was held otherwise, that in many cases there may be a sharing of profits, and yet no partnership.

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3. I. C. A. s. 266; see Art. 8, below.

4. Mollwo v. Court of Wards, L. R. 4 P. C. 436.

5. Lindley, i. 26, 58; French v. Styring, 2 C. B. (N. S.) 357, 366. As to part owners of ships (the most common and important case), see Lindley, i. 67; Maude and Pollock on Merchant Shipping (3d ed.), 72; Maclachlan on Merchan Shipping (2d ed.), 90, 102; Smith Merc. Law (8th ed.), 191; 3 Kent Comm. 154, 155; and Story on Partnership, ch. xvi. *passim*.

6. Per Cockburn, C. J., 2 C. B. (N. S.) 363; c. p. Crawshay v. Maule, 1 Swanst. 523; Stewart v. Blakeway, 4 Ch. 603.

7. Lindley, i. (3d ed.), 26; Lyon v. Knowles, 3 B. & S. 556.

ARTICLE 2.

SHARING PROFITS ONLY EVIDENCE OF PARTNERSHIP.

Subject to the special provisions hereinafter stated, the receipt of a share of profits, or of a payment contingent upon or varying with profits, is relevant, but not conclusive, to show the existence of a partnership.[8] Whether a partnership does or does not exist in any particular case depends on the real intention and contract of the parties, as shown by the whole facts of the case.[9]

ILLUSTRATIONS.

Rule in Cox v. Hickman, and later Applications.[1]

1. A trader is indebted to several creditors, and they enter into an arrangement with him by which the trade is to be conducted under their superintendence, and they are to be gradually paid off out of the profits. These creditors do not thereby become partners of the debtor in his trade, or liable for the debts of the concern; for "the real ground of the liability," where such liability exists, "is that the trade has been carried on by persons acting on his behalf;"[2] and, in the case of such an arrangement as this, the trade is not carried on by or on account of the creditors. The test of liability is not merely whether there is a participation of profits, but whether there is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.[3]

2. A partnership is entered into for a term certain, and it is provided by a clause in the articles that if a partner dies before the end of the term his representatives shall, during the rest of the term, receive the share of profits he would have been entitled to if living; a partner having died, his share of profits is paid from time to time to his executors, under this agreement. The executors do not thereby become partners.[4]

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8. See Gilm. Part. 19; Gilm. Cor. Part. 31.

9. Mollwo, March & Co. v. Court of Wards, L. R. 4 P. C. 419, 435; Gilm. Part. 5, 6; Gilm. Cor. Part. 31.

1. Cox v. Hickman has been generally followed in the United States. Gilm. Part. 23.

2. Cox. v. Hickman, 8 H. L. C. 268, 306 (the leading case which put the law on its present footing); Gilm. Cor. Part. 19, 31.

3. Lord Wensleydale in Cox v. Hickman, 8 H. L. C. 312, 313; Blackburn, J., in Bullen v. Sharp (Ex. Ch.). L. R. 1 C. P. 111, 112; Cleasby, B., Ib. 118; and further on, the effect of Cox v. Hickman, Bramwell, B., Ib. 127, and Lindley, i. (3d ed.), 44, 45.

4. Holme v. Hammond, L. R. 7 Ex. 218.

3. The business of an underwriter is conducted by A in the name of B, and A receives a fixed salary and one-fifth of the profits, subject, as to this one-fifth, to be wholly or partially refunded in the event of unexpected losses becoming known after the division of profits in any year. The contract between A and B is not one of partnership, but of hiring and service.[5]

ARTICLE 3.

ACT TO AMEND LAW OF PARTNERSHIP—AS TO PERSON ADVANCING MONEY FOR SHARE OF PROFITS.[6]

"The advance of money, by way of loan, to a person engaged or about to engage in any trade or undertaking, upon a contract in writing[7] with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such."

ILLUSTRATIONS.

1. A, the proprietor of a music hall, signs and gives to B, in consideration of an advance of £250, a paper in the following terms: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the O music hall, to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86." This is not a contract for a share of profits within the Act, but constitutes a partnership at will, in which, as between A and B, B is to share profit without being liable for loss.[8]

2. B & Co. are traders in partnership. A lends money to the firm, on a contract in writing, under which the loan is to be repaid at the end of the partnership, and in the meantime A is to receive a certain share of profits, and is to be entitled to inspect the partnership books. This transaction is merely colorable as a loan, and is not within the Act, and A is liable as a partner for the debts of B & Co.[9]

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5. Ross v. Parkyns, 20 Eq. 331. See, also, Lilshaw v. Jukes, 3 B. & S. 847; Gilm. Part. 19, and cases cited.

6. 28 & 29 Vict. c. 86. See as to the effect of Cox v. Hickman and of this statute, 1 Lind. Part. (Ewell's ed.), *34 *et seq.* Consult the State statutes.

7. That is, a contract showing on the face of it that the transaction is one not of partnership but of loan. Syers v. Syers, 1 App. Ca. 174, per Lord Chelmsford.

8. Syers v. Syers, 1 App. Ca. 174.

9. Pooley v. Driver, 5 Ch. Div. 458.

ARTICLE 4.

AS TO AGENT RENUMERATED BY SHARE OF PROFITS.

"**No contract for the remuneration of a sevant or agent of any person engaged in any trade or undertaking, by a share of the profits** of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner."

ARTICLE 5.

AS TO WIDOWS OR CHILDREN OF DECEASED PARTNERS RECEIVING SHARE OF PROFITS AS ANNUITY.

"**No person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits** made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to any liabilities incurred by, such trader."

ARTICLE 6.

AS TO SELLER OF GOOD-WILL RECEIVING SHARE OF PROFITS.

"**No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will** of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of, the person carrying on such business."

Whether the Act adds to, Cox v. Hickman, qu.

It is by no means certain that this Act really adds anything material to what had already been decided in Cox v. Hickman.[1] But it is clear that its special provisions, even if to some extent superfluous, are not to be taken as in any way detracting from the generality of the principle laid down in that case.[2] It has been suggested that, whereas Cox v. Hickman decides only that sharing profits is not *conclusive* evidence of partnership, and leaves it to be dealt with as a question of fact whether this is *sufficient* evidence in any case, the Act goes a step farther, and prevents it from being alone sufficient in any of the classes of cases dealt with.[3]

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1. 8 H. L. C. 268.
2. See Holme v. Hammond, L. R. 7 Ex. at pp. 227, 232.
3. 1 Sm. L. C. (7th ed.), 951.

ARTICLE 8.

LIMIT TO NUMBER OF PARTNERS IN AN ORDINARY PARTNERSHIP.

An ordinary partnership may consist of any number of persons, not exceeding ten where the business of the partnership is banking, and not exceeding twenty where it is any other business.[4]

At common law there was no limit to the number of persons who might enter into partnership, and it is the better opinion [5] that there was nothing to prevent them from dividing the capital into transferrible shares and acting as a joint-stock company; but there were always great practical inconveniences about this. A partnership not complying with the conditions of the Companies Act is now illegal, and the members of such an association would be unable to enforce any claim arising out of the partnership dealings, although they would be individually liable for the debts of the concern to a creditor who had dealt with the firm without notice of the state of things making its business illegal.[6]

Associations carrying on that which at common law would be a partnership business, but exceeding the number of ten in the case of banking, and twenty in the case of any other business, and complying with the law by coming within one of the special categories laid down in the Companies Act, may be called extraordinary partnerships. They are governed by special rules of law, for the most part statutory, which we shall not here enter upon.

CHAPTER II.

OF THE FIRM.

ARTICLE 9.

THE FIRM.

"Persons who have entered into partnership with one another are called, collectively, a firm." [1]

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4. This by statute; Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.
5. Lindley, i. 201.
6. See Lindley, i. (3d ed.), 203-212.
1. I. C. A. s. 239.

ARTICLE 10.

PARTNERS MAY ADOPT FIRM-NAME AND USE IT IN ALL PARTNERSHIP AFFAIRS.

The business of a firm may [in the absence of any wrongful intent] be carried on under any name, not distinctly purporting to be a corporate name, which the partners think fit to adopt for that purpose,[2] subject to the condition mentioned in the next following Article.

The name so adopted is the name of the firm, and all acts done and instruments executed in that name by a partner or other person duly authorized thereto, are binding on all the partners.[3]

ARTICLE 11.

EXCLUSIVE RIGHT OF FIRM TO TRADE NAME.

Where a particular name under which a business is carried on by any person, firm or company has become associated with and appropriated to that business, no other person may carry on a like business under the name name, or a name only colorably differing therefrom, in a manner calculated to deceive customers by leading them to believe that they are dealing with such person, firm, or company as first mentioned.[4]

What Use of Names is lawful.

Generally speaking, every man is, by the law of England, free to call himself by what name he chooses, or by different names for different purposes,[5] so long as he does not use this liberty as the means of fraud or of

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2. Gilm. Part. 119. It is not necessary that the partners fix upon a firm name at all. Id. See also 1 Lind. Part. (Ewell's ed.), *112, 114, and notes.

3. As to the authority of partners to bind the firm, see Arts. 17-21, below.

4. See the authorities cited in the following notes. Also 1 Lind. Part. (Ewell's ed.), 114, and notes. This Article is inserted here for convenience, though it obviously belongs, properly speaking, not to the law of partnership, but to that subdivision of the general law of ownership which has to do with copyright and other analogous rights.

5. See the note in 3 Dav. Conv. pt. i. 357-362. Strictly speaking, this does not apply to names of baptism. The same or greater freedom existed in the Roman law, which allowed a change of *nomen*, *praenomen*, or *cognomen* alike. C. 9, 25, *de mutat. nom.* 1.

interfering with other substantive rights of his fellow-citizens. And this (in the absence of statutory restrictions) extends to commercial transactions as well as to the other affairs of life: "Individuals may carry on business under any name and style they may choose to adopt."[6] The style of the firm need not, and often does not, express the name of any actual member of it. It may contain, and often does contain, other names, or no individual names at all. On the other hand, although no man is to be prevented from carrying on any lawful business in his own name by the mere fact of his name and business being like another's,[7] yet the mere fact of the name itself being his own does not give him any right or license to do so with such additions and in such a manner as to deceive the public, and make them believe they are dealing with some one else.[8]

The assumption of corporate name is forbidden by statute in some jurisdictions.[9]

Exclusive Right to Trade Names analogous to Property in Trade-Mark.

But, "although in this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger," yet "the right to the exclusive use of a name in connection with a trade or business is familiar to our law."[1] This right is analogous to, but not identical with, the right to a trade-mark proper. The right of the possessor of a trade-mark in the strict sense (which is now subject to statutory conditions under the Trade-Marks Registration Act, 1875, and the amending Act of 1876) is to prevent competitors from trading on his reputation, and passing off their wares as his own by means of copies or colorable imitations of the visible sign or device which he has appropriated to his business; and the right of the possessor of a trade name stands on the like footing. "The principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."[2]

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6. Per Erle, C. J., Maughan v. Sharpe, 17 C. B. (N. S.) at p. 462.

7. Burgess v. Burgess, 3 D. M. G. 896.

8. Holloway v. Holloway, 13 Beav. 209; 1 Lind. Part. (Ewell's ed.), 114, and cases cited.

9. Gilm. Part. 119, 120.

1. Du Boulay v. Du Boulay, L. R. 2 C. P. 430, 441; 1 Lind. Part. (Ewell's ed.), *114 and notes.

2. Giffard, L. J., in Lee v. Haley, 5 Ch. at p. 161. The same principle has been acted on by the courts of France. Sirey, Codes Annotes, on Code de Commerce, 18, 19, no. 46 of note.

May be infringed in means of Trade-Marks, apart from infringement of Trade-Mark as such.

The right to a particular name may likewise be infringed circuitously, by means of a trade-mark fitted to bring goods into the market under a deceptive name. In such a case the first appropriator of the name has his remedy no less than if the name had been directly adopted by his rival, and it is no answer to his complaint to say that there is no such physical resemblance between the trade-marks as would deceive a customer of ordinary caution. The trade-mark complained of may be free from offence in its primary character and office as a visible symbol; but that will be no excuse for a breach of the distinct obligation to respect the trade names, as well as the trade marks, of other dealers.[3]

Whether Action lies against Corporation for trading in its Corporate Name, where the Name itself is an Infringement of existing Trade Name.

Where a name of incorporation is such as to be, if used for trading purposes, an infringement of an existing trade name, it is doubtful whether an action can be maintained against the corporation for trading in its corporate name, or whether the only remedy is not against those persons individually who procured that name to be given.[4] But such an action, it is submitted, may well lie. For, though it may be true that the corporation has no power to trade under any other name than its proper name of incorporation, yet it is in no way bound to trade at all; and, if it has a name under which it cannot trade without interfering with other persons' rights, that is its misfortune, but can surely make no dieffrence to their rights.

No Trade Name without actual Business.

There can be no trade name unless in connection with an existing business. A man cannot appropriate a name for this purpose by the mere announcement of his intention to trade under it.[5]

Firm not recognized as artificial Person—Otherwise in Scotland.

It may be proper to mention here that the law of England knows nothing of the firm as a body or artificial person distinct from the members

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3. Seixo v. Provezende, 1 Ch. 192. The leading authorities on this and the allied subject of trade-marks are collected in Cope v. Evans, 18 Eq. 138; see, too, the explanations and distinctions given in Singer Manufacturing Co. v. Wilson, 2 Ch. D. at pp. 441 *seq.*, by Jessel, M. R., and S. C. in C. A. Ib. 451 *seq.*

4. Lawson v. Bank of London, 18 C. B. 84.

5. Ib.

composing it,[6] though the firm is so treated by the universal practice of merchants and by the law of Scotland. In England, the firm name may be used in legal instruments, both by the partners themselves and by other persons, as a collective description of the persons who are partners in the firm at the time to which the description refers; [7] and, under the present Rules of the Supreme Court, actions may now be brought by and against partners in the name of their firm.[8] But an action between a partner and the firm, or between two firms having a common member, was impossible at common law, and probably remains so.[9]

ARTICLE 12.

GUARANTY FOR OR TO A FIRM NOT BINDING, AS TO EVENTS HAPPENING AFTER A CHANGE IN THE CONSTITUTION OF THE FIRM, UNLESS CONTRARY INTENTION APPEARS (MERCANTILE LAW AMENDMENT ACT).

"**No promise to answer for the debt, default, or miscarriage of another**, made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or a single person trading under the name of a firm, shall be binding on the person making such promise, in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding, notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise." [1]

This affirms Common Law.

This enactment of the Mercantile Law Amendment Act, 1856, is believed to have only affirmed the result of previous decisions.[2]

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6. Lindley, i. 112, 458 (Ewell's ed.).

7. Ib., 112, 458 (Ewell's ed.).

8. Order ix. r. 6, etc.; Arts. 63-67, below.

9. The remedy in such case is in equity.

1. 19 & 20 Vict. c. 97, s. 4.

2. Backhouse v. Hall, 6 B. & S. 507, 520, per Blackburn, J., i. 2 Wms. Saund. 821; Lindley, i. (3d ed.), 225.

Evidence of Intention that Guaranty shall continue.

An intention that the promise shall continue to be binding, notwithstanding a change in the members of the firm, cannot be inferred from the mere fact that the primary liability is an indefinitely continuing one; as, for example, where the guaranty is for the sums to become due on a current account.[3] Such intention may appear "by necessary implication from the nature of the firm," where the members of the firm are numerous and frequently changing, and credit is not given to them individually, as in the case of an unincorporated insurance society.[4]

CHAPTER III.

OF PERSONS WHO ARE LIABLE AS PARTNERS.

ARTICLE 13.

PERSONS LIABLE BY "HOLDING OUT."

"A person who has by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm." [1]

ARTICLE 14.

Whoever knowingly suffers himself to be represented as a partner in a particular firm is liable as such partner to any one who has, on the faith of such representation, given credit to the firm.[2]

This Rule a Branch of Estoppel.

"Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by es-

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3. Backhouse v. Hall, *supra*.

4. See Metcalf v. Bruin, 12 East, 400.

1. I. C. A. 245.

2. Slightly altered from I. C. A. 246; Gilm. Part. 279.

toppel."[3] The rule is, in fact, nothing else than a special application of the much wider principle of estoppel, which is that, if any man has induced another, whether by assertion or by conduct, to believe in and to act upon the existence of a particular state of facts, he cannot be heard, as against that other, to deny the truth of those facts.[4] It is therefore immaterial whether there is or is not in fact, or to the knowledge of the creditor, any sharing of profits. And it makes no difference even if the creditor knows of the existence of an agreement between the apparent partners that the party lending his name to the firm shall not have the rights or incur the liabilities of a partner. For his name, if lent upon a private indemnity as between the lender and borrower, is still lent for the very purpose of obtaining credit for the firm on the faith of his being responsible; and the duty of the other partners to indemnify him, so far from being inconsistent with his liability to third persons, is founded on it and assumes it as unqualified.[5]

What amounts to "holding out."

To constitute "holding out" there must be a real lending of the party's credit to the partnership. The use of a man's name without his knowledge cannot make him a partner by estoppel.[6] Also the use of his name must have been made known to the person who seeks to make him liable; otherwise there is no duty towards that person.[7] There may be a "holding out" without any direct communication, by words or conduct, between the parties. One who makes an assertion intending it to be repeated and acted upon, or even under such curcumstances that it is likely to be repeated and acted upon, by third persons, will be liable to those who afterwards hear of it and act upon it. "If the defendant informs A B that he is a partner in a commercial establishment, and A B informs the plaintiff, and the plaintiff, believing the defendant to be a member of the firm, supplies goods to them, the defendant is liable for the price." If the party is not named, or even if his name is refused, but at the same time such a description is given as sufficiently identifies the person the result is the same as if his name had been given as a partner.[8]

Doctrine of "holding out" applies to administration in Bankruptcy.

The rule as to "holding out" extends to administration in bankruptcy.

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3. Per Cur., Mollwo, March & Co. v. Court of Wards, L. R. 4 P. C. at p. 435.

4. For fuller and more exact statements see Carr v. London & Northwestern Railway Co., L. R. 10 C. P. at pp. 316, 317; Stephens' Digest of the Law of Evidence, 105 (Art. 102).

5. Lindley, i. (3d ed.), 48.

6. Lindley, i. (3d ed.), 50; Fox. v. Clifton, 6 Bing. 777, 496.

7. 1 Lind. Part. (Ewell's ed.), 42 *et seq.;* Gilm. Part. 279; Martyn v. Gray, 14 C. B. (N. S.) 824.

8. Per Williams, J., Martyn v. Gray, 14 C. B. (N. S.) 841.

If two persons trade as partners, and buy goods on their credit as partners, and afterwards both become bankrupt, then, whatever the nature of the real agreement between themselves, the assets of the business must be administered as joint estate for the benefit of the creditors of the supposed firm.[9]

It does not apply to bind a Deceased Partner's Estate.

The doctrine of "holding out" does not extend to bind the estate of a deceased partner where, after his death, the business of the firm is continued in the old name; and whether creditors of the firm know of his death or not is immaterial. "The executor of the deceased incurs no liability by the continued use of the old name."[1]

Liability of Retired Partners.

A partner who has retired from the firm may be liable, on the principle of "holding out," for debts of the firm contracted afterwards, if he has omitted to give notice of his retirement to the creditors.[1a] But he cannot be thus liable to a creditor of the firm who did not know him to be a member while he was such in fact, and therefore cannot be supposed to have dealt with the firm on the faith of having his credit to look to.[2] This is the meaning of the saying that "a dormant partner may retire from a firm without giving notice to the world."[3]

CHAPTER IV.

OF THE LIABILITY OF PARTNERS FOR PARTNERSHIP DEBTS, AND THE AUTHORITY OF PARTNERS TO BIND THE FIRM.

ARTICLE 15.

LIABILITY OF PARTNERS FOR DEBTS OF FIRM.

Every partner is liable jointly with the other partners, and in the case of mercantile contracts [at all events] is also severally liable for all debts and obligations incurred

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9. Re Rowland and Crankshaw, 1 Ch. 421. As to reported ownership, see Gilm. Part. 435, 436.

1. Lindley, i. 52, 53, 418.

1a. Gilm. Part. 265 *et seq.*

2. Carter v. Whaley, 1 B. & Ad. 11.

3. Heath v. Sansom, 4 B. & Ad. 172, 177, per Patterson, J. On the subjects of this and of the preceding paragraph, see further Art. 53, below, and Gilm. Part. 111, 272.

while he is a partner and in the usual course of the partnership business by or on behalf of the firm.[1]

The individual partner's liability for the dealings of the firm, whether he has himself taken an active part in them or not, is of the same nature as the liability of a principal for the acts of his agent, and is often treated as a species of it.[2] "Each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently is liable to the performance of all such contracts in the same manner as if entered into personally by himself."[3]

The limitation of the liability to things done in the usual course of business will be presently spoken of under the correlative head of the partner's authority to bind the firm.

Whether joint or joint and several.

On the question whether the liability is joint only, or joint and several, it is stated by Mr. Justice Lindley that it is "in equity not only joint, but also several, except under special circumstances."[4]

The Master of the Rolls, in a recent case where the doctrine was considered, declined to affirm this except as to the contracts of mercantile partnerships, but did not contradict it.[5]

ARTICLE 16.

LIABILITIES OF OUTGOING AND INCOMING PARTNERS.

A partner who retires from a firm, or the estate of a partner who dies, does not thereby cease to be liable for partnership debts contracted before his retirement or death,[6] and a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors

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1. Slightly altered from I. C. A. 249.

1a. Unless modified by statute or doctrines of equity, the liability of partners with respect to partnership transactions, is joint and not several. Gilm. Part. 217 *et seq.*; 1 Lind. Part. (Ewell's ed.), *192, and notes.

2. See Cox v. Hickman, 8 H. L. C. at pp. 304, 312; Lindley, i. (3d ed.), 379-382.

3. Per Tindal, C. J.; Fox v. Clifton, 6 Bing. at p. 776.

4. Lindley, i. (3d ed.), 382.

5. Beresford v. Browning, 20 Eq. 564, 573, 577; and see per James, L. J., S. C. in C. A. 1 Ch. D. 30, 34.

6. Lindley i. (3d ed.), 451; Gilm. Part. 249. In some jurisdictions the retiring partner becomes, under certain circumstances, secondarily liable. Id.

of the firm for anything done before he became a partner;[7] but a retiring partner may be discharged from any existing liabilities, and an incoming partner may become subject thereto, by an agreement to that effect between the members of the new firm and the creditor.

Such agreement as last aforesaid may be either express or inferred as a fact from the course of dealing between the creditors and the new firm.[8]

ILLUSTRATIONS.

1. A, B, and C are partners. D is a creditor of the firm. A retires from the firm, and B and C, either alone or together with a new partner, E, take upon themselves the liabilities of the old firm. This alone does not affect D's right to obtain payment from A, B, and C, or A's liability to D.[9]

2. A partnership firm, consisting of A, B, and C, enters into a continuing contract with D, which is to run over a period of three years. After one year A retires from the firm, taking a covenant from B and C to indemnify him against all liabilities under the contract. D knows of A's retirement. A remains liable to D under the contract, and is bound by everything duly done under it by B and C after his retirement from the firm.[1]

3. A, B, and C are bankers in partnership. A dies, and B and C continue the business. D, E, and F, customers of the bank at the time of A's death, continue to deal with the bank in the usual way after they know of A's death. The firm afterwards becomes insolvent. A's estate remains liable to D, E, and F for the balances due to them respectively at the time of A's death, less any sum subsequently drawn out.[2]

In the case last put, one customer, D, discovers that securities held by the bank for him have been sold without his authority in A's lifetime. Here A's estate is not discharged from being liable to make good the loss, for the additional reason that D could not elect to discharge it from this particular liability before he knew of the wrongful sale.[3]

4. A and B are partners. F is a creditor of the firm. A and B take C into partnership. C brings in no capital. The assets and liabilities of the old firm are, by the consent of all the partners—but without any express provision in the new deed of partnership—transferred to and as-

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7. Lindley, i. (3d ed.), 404; I. C. A. 249; Gilm. Part. 242.

8. Lindley, i. (3d ed.), 450-465. See Gilm. Part. 242.

9. Lindley, i. (3d ed.), 451; Gilm. Part. 249.

1. Oakford v. European and American Steam Shipping Company, 1 H. & M. 182, 191. See, also, Swire v. Redman, 1 Q. B. D. 536.

2. Devaynes v. Noble, Sleech's case, 1 Mer. 539, 569; Clayton's Case, Ib. 572, 604.

3. Clayton's Case, Ib. 579.

sumed by the new firm. The accounts are continued in the old books as if no change had taken place, and existing liabilities, including a portion of F's debt, are paid indiscriminately out of the blended assets of the old and the new firm. F continues his dealings with the new firm on the same footing as with the old, knowing of the change, and treating the partners in the new firm as his debtors. The new firm of A, B, and C is liable to F.[4]

Test of Liability of new Firm.

To determine whether an incoming partner has become liable to an existing creditor of the firm, two questions have to be considered:

1st. Whether the new firm has assumed the liability to pay the debt.

2d. Whether the creditor has agreed to accept the new firm as his debtors, and to discharge the old partnership from its liability.[5]

Novation.

Novation is the technical name for the contract of substituted liability, which is, of course, not confined to cases of partnership. As between the incoming partner and the creditor, the consideration for the undertaking of the liability is the change of the creditor's existing rights.[6]

Mere Agreement between Partners cannot operate as Novation.

An agreement between the old partners and the incoming partner, that he shall be liable for existing debts, will not of itself give the creditors of the firm any right against him, for it is a general rule that not even the express intention of the parties to a contract can enable a third person, for whose benefit it was made, to enforce it.[7] An incoming partner is liable, however, for new debts arising out of a continuing contract made by the firm before he joined it; as where the old firm had given a continuing order for the supply of a particular kind of goods.[8]

There is in law nothing to prevent a firm from stipulating with any creditor, from the beginning, that he shall look only to the members of the firm for the time being; the term *novation*, however, is not properly applicable to such a case.[9]

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4. Rolfe v. Flower, L. R. I. P. C. 27.

5. Ib. p. 38.

6. See Lindley, i. (3d ed.), 452; Gilm. Part. 242, 250.

7. Pollock's Principles of Contract, 190.

8. Lindley, i. (3d ed.), 406.

9. This is involved in Hort's Case and Grain's Case, 1 Ch. D. 307, where the deed of settlement of an insurance company contained a power to transfer the business and liabilities, and a transfer made under that power was decided to be binding on the policy-holders. As to the misuse of the term *novation*, see per James, L. J., at p. 322.

ARTICLE 17.

POWER OF PARTNER TO BIND THE FIRM.

Each partner who does any act necessary for, or usually done in, carrying on business of the kind carried on by the firm of which he is a member, binds his partners to the same extent as if he were their agent duly appointed for that purpose.[1]

"Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes."[2]

"Odinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, and which he represents as partnership business, and not being in its nature beyond the scope of the partnership."[3]

But not where he has neither apparent nor real Authority.

The firm is not bound when a person who is in fact a member of it, but is not known to be so, and has, in fact, no authority to act for it, takes upon himself so to do.[4]

"In the common case of a partnership, where, by the terms of the partnership, all the capital is supplied by A, and the business is to be carried on by B and C in their own names, it being a stipulation in the contract that A shall not appear in the business or interfere in its management; that he shall neither buy nor sell, nor draw nor accept bills; no one would say that, as among themselves, there was any

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1. Slightly altered from 1. C. A. 251; see Lindley, i. (3d ed.), 248. See a collection of cases on this point in Lind. Part. (Ewell's ed.), *124 *et seq.*, notes; also Gilm. Part. 276.

2. Lord Westbury in *Ex parte* Darlington, etc., Banking Co., 4 D. J. S. 581, 585.

3. James, L. J., in Baird's Case, 5 Ch. at p. 733.

4. Lindley, i. (3d ed.), 249; 1 id. (Ewell's ed.), 126; Nicholson v. Rickets, 2 E. & E. 524.

agency of each one for the others. If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods which would bind his co-partners, but in the ordinary case this would not be so, and he would not in the slightest degree be in the position of an agent for them."[5]

What kind of Acts in general bind the Firm.

The acts of a partner done in the name of a firm will not bind the firm merely because they are convenient, or prudent, or even necessary, for the particular occasion. The question is, what is necessary for the usual conduct of the partnership business; that is the limit of each partner's general authority; he is the general agent of the firm, but he is no more. "**A power to do what is usual does not include a power to do what is unusual,** however urgent."[6]

Whether a particular act is "necessary to the transaction of a business in the way in which it is usually carried on" is a question "to be determined by the nature of the business, and by the practice of persons engaged in it."[7] This must once have been in all cases, as it still would be in a new case, a question of fact. But, as to a certain number of frequent and important transactions, there are well understood usages extending to all trade partnerships, and now constantly recognized by the Court; these have become, in effect, rules of law, and it seems best to give them as such, and this we proceed to do.

ARTICLE 18.

IMPLIED AUTHORITY OF PARTNERS IN TRADE AS TO CERTAIN TRANSACTIONS.

Subject to the limitations expressed in the three next following Articles, every partner in a trading partnership may bind the firm by any of the following acts:

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5. Cleasby, B.; Holme v. Hammond, L. R. 7 Ex. at p. 233. See, also, next note, *ante*.

6. Lindley, i. (3d ed.), 250; Gilm. Part. 276.

7. Lindley, i. (3d ed.), 251.

a. **He may accept, make, and issue bills** and other negotiable instruments in the name of the firm.[8]
b. **He may borrow money** on the credit of the firm.[9]
c. **He may for that purpose pledge [or mortgage] any goods** or personal chattels belonging to the firm.[1]
d. **He may for the like purpose make an equitable mortgage,** by deposit of deeds or otherwise, of real estate or chattels real belonging to the firm.[2]
e. **He may sell any goods or personal chattels of the firm.**[3]
f. **He may purchase, on account of the firm,** any goods of a kind necessary for, or usually employed in, the business carried on by it.[4]
g. **He may receive payment of debts** due to the firm, and give receipts or releases for them.[5] He may also pay and settle firm debts.[6]

The general powers of partners as agents of the firm, are summed up by Story in a passage which has been adopted by the Judicial Committee of the Privy Council: [7]

"Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is *praepositus negotiis societatis*, and may, consequently, bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, endorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, checks, and other negotiable paper in the name and on account of the partnership."

The particular transactions in which the power of a partner to bind the firm has been called in question, and either upheld or disallowed, are exhaustively considered by Mr. Justice Lindley (1. 3d. ed. 277-313).[8] **A certain number of the leading heads may here be selected by way of illustration.**

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8. Gilm. Part. 302.
9. Id. 300.
1. Id. 294.
2. Not applicable in this country. He has no implied authority to mortgage the firm's realty. Id. 295.
3. Id. 288, as to firms dealing in real estate, see id.
4. Id. 298.
5. Id. 344.
6. Id. 345.
7. Story on Agency, § 124; Bank of Australasia v. Breillat, 6 Moo. P. C. 193.
8. 1 Lind. Part. (Ewell's ed.), *128 *et seq.*, and notes.

AUTHORITY TO BIND THE FIRM IMPLIED.

Negotiable Instruments.

The power of binding the firm by negotiable instruments is one of the most frequent and important.

Exceptions as to Directors of numerous Associations.

In trading partnerships every partner has this power, unless specially restrained by agreement.[9] In the case of a non-trading partnership, those who seek to hold the firm bound must prove that such a course of dealing is necessary or usual in the particular business.[1] In case, again, of an association "too numerous to act in the way that an ordinary partnership does,"[2] whose affairs are under the exclusive management of a small number of its members—in other words, an unincorporated company—the presumption of authority does not exist either for this purpose or in the other cases where the partners have in general an implied authority; for the ordinary authority of a partner is founded on the mutual confidence involved, in ordinary cases, in the contract of partnership; and this confidence is excluded when the members of the association are personally unknown to one another.

In such a case those who are mere shareholders have no power at all to bind the rest, and the directors or managing members have no more than has been conferred on them expressly, or by necessary implication, in the constitution of the particular society.[3] But since the Companies Acts this rule is not likely to have much practical application.

Borrowing Money.

Every partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm.[4] The directors of a numerous association, according to the rule above explained, have no such authority beyond what may have been specially committed to them.[5]

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9. Lindley, i. (3d ed.), id. (Ewell's ed.), *130; Bank of Australasia v. Breillat, 6 Moo. P. C. at p. 194; *Ex parte* Darlington, etc., Banking Co., 4 D. J. S. 585.

1. Gilm. Part. 304; 1 Lind. Part. (C. & Co.'s ed.), 130.

2. 3 D. M. G. 477.

3. Dickinson v. Valpy, 10 B. & C. 128, and other authorities referred to in Lindley, i. (3d ed.), 281; id. (Ewell's ed.), 129; Pollock's Principles of Contract, 113.

4. Bank of Australasia v. Breillat, *supra*.

5. Burmester v. Norris, 6 Ex. 796; Gilm. Part. 300.

Sale and pledge of Partnership Property.

Every partner has implied authority to dispose, either by way of sale or (where he has power to borrow on the credit of the firm) by way of pledge, of any part of the goods or personal property belonging to the partnership,[6] unless it is known to the lender or purchaser that it is the intention of the partner offering to dispose of partnership property to apply the proceeds to his own use, instead of accounting for them to the firm.[7]

A partner having power to borrow on the credit of the firm may probably give a valid equitable security, by deposit of deeds or otherwise, over any real estate of the partnership.[8]

But a legal conveyance, whether by way of mortgage or otherwise, of real estate or chattels real of the firm cannot be given except by all the partners, or with their express authority given by deed.[9]

Purchase.

A partner may buy on the credit of the firm any goods of a kind used in its business, and the firm will be bound, notwithstanding any subsequent misapplication of them by that partner.[1] This power extends to non-trading partnerships.[2]

Payment to and release by one Partner.

Payment to one partner is a good payment to the firm,[3] and by parity of reason a release by one partner binds the firm, "because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment."[4]

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6. Lindley, i. (3d ed.), 301, 311; Gilm. Part. 288, 294.
7. *Ex parte* Bonbonus, 8 Ves. 540.
8. Lindley, i. (3d ed.), 301.
9. Lindley, i. (3d ed.), 301; Gilm. Part. 295.
1. Bond v. Gibson, 1 Camp. 185; Gilm. Part. 298.
2. Lindley, i. (3d ed.), 307.
3. Lindley, i. (3d ed.), 288; Gilm. Part. 244.
4. Best, C. J.; Stead v. Salt, 3 Bing. at p. 103.

AUTHORITY TO BIND THE FIRM NOT IMPLIED.

Deeds.

One partner cannot bind the others by deed without express authority (which must itself be under seal),[5] and, where the partnership articles are under seal, the fact of their being so does not of itself confer any authority for this purpose.[6]

Guaranties.

One partner cannot bind the others by giving a guaranty in the name of the firm, even if the act is in itself a reasonable and convenient one for effecting the purposes of the partnership business, unless such is the usage of that particular firm, or the general usage of other firms engaged in the like business;[7] in other words, there is no general implied authority for one partner to bind the firm by guaranty, but agreement may confer such authority as to a particular firm, or custom as to all firms engaged in a particular business. In the latter case, however, the force of the custom really depends on a presumed agreement among the partners that the business shall be conducted in the usual and customary manner.

Submission to Arbitration.

It is not competent to one member of a partnership to bind the firm by a submission to arbitration.[8]

ARTICLE 18A.

LIMITED POWER OF MANAGERS IN NUMEROUS PARTNERSHIPS.

Where the members of a partnership are too numerous to act as partners in the ordinary way, and it is provided by the constitution of the partnership that its affairs shall

5. Steiglitz v. Egginton, Holt, 141; Gilm. Part. 295.

6. Harrison v. Jackson, 7 T. R. 207.

7. Brettel v. Williams, 4 Ex. 623; 1 Lind. Part. (Ewell's ed.), *138, and notes.

8. Stead v. Salt, 3 Bing. 101; 1 Lind. Part. (Ewell's ed.), *129, and notes. The American cases are not however, unanimous on this question, id. note 1.

be conducted and controlled only by a limited number of its members (hereinafter called directors), then no members of the partnership, not being directors, can bind the others by their acts, and the directors can bind the others only within the scope of the authority conferred on them expressly, or by necessary implication, in the constitution of the partnership.

Apart from the Companies Acts, this is undoubted law; but, as above suggested, it is perhaps doubtful whether an association of this kind would now be recognized as differing in any respect from an ordinary partnership.[9]

ARTICLE 19.

PARTNER USING CREDIT OF FIRM FOR PRIVATE PURPOSES.

Where one partner pledges the credit of the firm for a purpose apparently not connected with the partnership affairs, whether the transaction itself is or is not of a class within his apparent general authority, the firm is not bound, unless he is in fact specially authorized by the other partners [or, perhaps, unless the party dealing with him had reasonable ground for believing him to be so authorized].

The passage already partly cited from Story (Art. 18, above) continues as follows:

"The restrictions of this implied authority of partners to bind the partnership are apparent from what has already been stated. Each partner is an agent only in and for the business of the firm; and, therefore, his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it when the other party to the transaction is cognizant of, or co-operates in, such breach of duty."[1]

Persons who "have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it,"[2] cannot say that they were misled by

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9. If unincorporated, such an association, in the absence of statutes changing the rule, would be a partnership and subject to the rules governing that department of the law, 2 Lind. Part. (Ewell's ed.), 757 (Chapter by M. D. Ewell), and cases cited in the notes.

1. Story on Agency, § 125; Bank of Australasia v. Breillat, 6 Moo. P. C. 194.

2. *Ex parte* Darlington, etc., Banking Co., 4 D. J. S. at 585; I Lind. Part. (Ewell's ed.), 170, and notes.

his apparent general authority presumably exists for the benefit and for the purposes of the firm—not for those of its individual members. The commonest case—indeed, the only case at all common—to which this principle has to be applied, is that of one partner giving negotiable instruments or other security, in the name of the firm, to raise money (to the knowledge of the person advancing it) for his private purposes, or for the satisfaction of his private debt.[3]

"The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or, at least, that he himself had reason to believe so."[4]

"If a person lends money to a partner for purposes for which he has no authority to borrow it on behalf of the partnership, the lender, having notice of that want of authority, cannot sue the firm."[5]

"When a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership—that he is going beyond the scope of his agency; and express authority, therefore, is necessary from the other partner to warrant that payment."[6]

Whether the Creditor may be entitled as against the Firm by reasonable Belief in the Partner's Authority.

It is doubtful whether a separate creditor thus taking partnership securities or funds from one partner is justified even by having reasonable cause to believe in the existence of a special authority; the opinion has been expressed by Cockburn, C. J., that he deals with him altogether at his own peril.[7] But it may happen that the other partner whom the separate creditor seeks to bind has so conducted himself as to give reasonable ground for supposing there is authority; and, where he has done so, he may be bound on the general principle of estoppel. The rule is stated with this qualification or warning by Blackburn, J., and Montague Smith, J.[8]

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3. See the cases referred to in the next note, and Hilbut v. Nevill, L. R. 4 C. P. 354, in Ex. C. H. 5 C. P. 478.

4. Smith, Merc. Law, 45 (7th & 8th edd.), adopted by Keating and Byles, JJ., in Leverson v. Lane, 13 C. B. (N. S.) 278; by Lord Westbury in *Ex parte* Darlington, etc., Banking Co., 4 D. J. S. 585; and by Cockburn, C. J. (subject to a doubt as to the last words in Kendal v. Wood (Ex. Ch.), L. R. 6 Ex. 248.

5. Bank of Australasia v. Breillat, 6 Moo. P. C. 196.

6. Montague Smith, J., in Kendal v. Wood, L. R. 6 Ex. 253.

7. L. R. 6 Ex. 248.

8. L. R. 6 Ex. 251, 253.

Instance of the General Rule.

Another special application of the foregoing rule was made in a case where two out of three partners gave an acceptance in the name of the firm for a debt incurred before the third had entered the partnership. This was held not to bind the new partner, for it was, in effect, the same thing as an attempt by a single partner to pledge the joint fund for his individual debts.[9]

Again, if a customer of a trading firm stipulates with one of the partners for a special advantage in the conduct of their business with him, for a consideration which is good as between himself and that partner, but of no value to the firm, the firm is not bound by this agreement, and incurs no obligation in respect of any business done in pursuance of it.[1]

The same principle applies to the rights of persons taking negotiable instruments endorsed in the name of the firm. Where a partner authorized to endorse bills in the partnership name and for partnership purposes endorses a bill in the name of the firm for his own private purposes, a holder who takes the bill, not knowing the endorsement to be for a purpose foreign to the partnership, can still recover against the other partners, notwithstanding the unauthorized character of the endorsement as between the partners;[2] but, if he knows that the endorsement is in fact not far a partnership purpose, he cannot recover.[3]

ARTICLE 20.

EFFECT OF NOTIFICATION THAT FIRM WILL NOT BE BOUND BY ACTS OF PARTNER.

All or any of the partners in a firm may give notice that the firm will not be bound by acts, or by some class of acts, done in the name of the firm by any one or more of the partners; and, if such partner or partners as last aforesaid deal in the name of the firm, in any matter comprised in such notice, with any person to whose knowledge such notice has come, the firm is not bound thereby.[4]

Restrictive Agreement inoperative if not notified.

It is clear law that, if partners agree between themselves that the apparent authority of one or more of them shall

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9. Shirreff v. Wilks, 1 East, 48; see per Le Blanc, J.

1. Bignold v. Waterhouse, 1 M. & S. 255.

2. Lewis v. Reilly, 1 Q. B. 349.

3. Garland v. Jacomb (Ex. Ch.), L. R. 8 Ex. 216. As to indorsements after dissolution see Gilm. Part. 348, 349.

4. 1 Lind. Part. (Ewell's ed.), *170, and notes.

be restricted, such an agreement is inoperative against persons having no notice of it.

"Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. * * * Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons dealing with the firm without notice have no concern."[5]

Effect of Notice: semble there must be a distinct Warning.

ARTICLE 21.

ADMISSIONS AND REPRESENTATIONS OF PARTNERS.

An admission made by one partner concerning the partnership affairs [after the fact of a partnership has been proved by other evidence] is relevant against the firm, and a representation made by one partner to any person concerning the partnership affairs has the same effect as against the firm, and so far as concerns the civil rights and liabilities of the partners, as if it had been made by all the partners.[6]

Explanation.— This does not apply to a representation made by one partner as to the extent of his own authority to bind the firm.[7]

An admission made by a partner, though relevant against the firm, is, of course, not conclusive;[8] for an admission is not conclusive against the person actually making it. Representations, however, may be conclusive by way of estoppel, or under some of the rules of equity which are in truth

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5. Lord Cranworth; Cox v. Hickman, 8 H. L. C. 304. See next note *supra*.

6. Wickham v. Wickham, 2 K. & J. 478, 491; 1 Lind. Part. (Ewell's ed.), 128, and notes.

7. *Ex parte* Agace, 2 Cox, 312; 1 Lind. Part. *supra*, 129, note.

8. Stead v. Salt, 3 Bing. 103; 1 Lind. Part. *supra*, 128.

akin to the legal doctrine of estoppel, and rest on the same principle.[9]

The limit of the rule above given by way of explanation is advisedly so given, as not being a real exception. Its necessity is obvious, for otherwise one partner could bind the firm to anything whatever by merely representing himself as authorized to do so.

CHAPTER V.

OF THE LIABILITY OF PARTNERS FOR WRONGS.

ARTICLE 22.

Liability of Partners for Wrongs.

Every partner is liable jointly with his fellow-partners [and also severally] for all sums and damages which the firm, while he is a partner therein, becomes liable for under either of the two next following Articles.

The cases in question are, as will immediately appear, those where a fraud or wrong is committed by one partner in the course of the business of the firm. There is no reason to doubt that in the case of a breach of trust, or wrong other than fraud, the liability is several as well as joint;[1] and it is difficult to see why it should be otherwise in the case of fraud. It has once been held that, in a suit to recover from one partner money which had been misapplied by another, all the partners were necessary parties;[2] but this appears to have been a solitary and unconsidered decision, and it has since been expressly dissented from.[3]

ARTICLE 23.

Fraud, etc., in conduct of Partnership Business.

Where loss or injury is caused to third persons, or penal-

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9. Pollock's Principles of Contract, 478, 558, 561.

1. Lindley i. (3d ed.), 315, 328.

2. Atkinson v. Mackreth, 2 Eq. 570.

3. Plumer v. Gregory, 18 Eq. 621, 627.

ties incurred, by the wrongful act or negligence of any partner acting in the ordinary course of the business of the firm, the firm is liable therefor to the same extent as the partner so acting.[4]

ARTICLE 24.

Misapplication of Money or Property received for or in Custody of the Firm.

Where any money or property of a third person is received by one partner, acting within the scope of his ordinary apparent authority in partnership affairs, and is misapplied by that partner,[5] and where any money or property of a third person, being as such in the custody of the firm, is misapplied by any partner,[6] the firm is liable to make good the loss.

Explanation.— Money is deemed to be in the custody of the firm when it has been paid to any agent of the firm, or paid or credited to the account of the firm with any person, in the ordinary course of business, or under such circumstances that a partner using ordinary diligence in the partnership affairs would be aware of such payment or transaction.[7]

ILLUSTRATIONS.

1. A, B, and C are partners in a bank, C taking no active part in the business. D, a customer of the bank, deposits securities with the firm for safe custody, and these securities are sold by A and B without D's authority. The value of the securities is a partnership debt, for which the firm is liable to D; and C, or his estate, is liable whether he knew of the sale or not.[8]

2. A and B are solicitors in partnership. C, a client of the firm, hands a sum of money to A, to be invested on a specific security. A never invests it, but applies it to his own use. B receives no part of the money.

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4. Lindley, i. (3d ed.), 315; id. (Ewell's ed.), 148; Gilm. Part. 324 *et seq.*, 333.

5. Blair v. Bromley, 2 Ph. 354; Gilm. Part. 334.

6. St. Aubyn v. Smart, 3 Ch. 646; Plumer v. Gregory, 18 Eq. 621; Gilm. Part. 334.

7. Marsh v. Keating, 2 Cl. & F. 250, 289. It may be doubted whether this explanation is really necessary. See note on this case below.

8. Devaynes v. Noble, Clayton's Case, 1 Mer. 572, 579.

and knows nothing of the transaction. B is liable to make good the loss, since receiving money to be invested on specified securities is part of the ordinary business of solicitors.[9]

3. If, the other facts being as in the last illustration, C had given the money to A with general directions to invest it for him, B would not be liable, since it is no part of the ordinary business of solicitors to receive money to be invested at their discretion.[1]

4. J. and W. are in partnership as solicitors. P. pays £1,300 to J. and W., to be invested on a mortgage of specified real estate, and they jointly acknowledge the receipt of it for that purpose. Afterwards P. hands over £1,700 to W., on his representation that it will be invested on a mortgage of some real estate of F., another client of the firm, such estate not being specifically described. J. dies, and afterwards both these sums are fradulently applied to his own use by W. W. dies, having paid interest to P. on the two sums till within a short time before his death, and his estate is insolvent. J.'s estate is liable to make good to P. the £1,300, with interest from the date when interest was last paid by W., but not the £1,700.[2]

5. A and B, solicitors in partnership, have, by the direction of C, a client, invested money for him on a mortgage, and have from time to time received the interest for him. A receives the principal money without directions from C, and without the knowledge of B, and misapplies it. B is not liable, as it was no part of the firm's business to receive the principal money.[3]

6. A, one of the partners in a banking firm, advises B, a customer, to sell certain securities of B's which are in the custody of the bank, and to invest the proceeds in another security to be provided by A. B sells out by the agency of the bank in the usual way, and gives A a check for the money, which he receives and misapplies without the knowledge of the other partners. The firm is not liable to make good the loss to B, as it is not part of the ordinary business of bankers to receive money generally for investment.[4]

7. A customer of a banking firm buys stock through the agency of the firm, which is transferred to A, one of the partners, in pursuance of an arrangement between the partners, and with the customer's knowledge and assent, but not at his request. A sells out this stock without authority, and the proceeds are received by the firm. The firm is liable to make good the loss.[5]

8. A customer of a banking firm deposits with the firm a box containing securities. He afterwards authorizes one of the partners to take out some of these and replace them by certain others. That partner not only makes

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9. Blair v. Bromley, 2 Ph. 354.

1. Harman v. Johnson, 2 E. & B. 61.

2. Plumer v. Gregory, 18 Eq. 621.

3. Sims v. Brutton, 5 Ex. 802.

4. Bishop v. Countess of Jersey, 2 Drew. 143.

5. Devaynes v. Noble, Baring's Case, 1 Mer. 611, 614.

the changes he is authorized to make in the contents of the box, but proceeds to make other changes without authority, and converts the customer's securities to his own use. The firm is not liable to make good the loss, as the separate authority given to one partner by the customer shows that he elected to deal with that partner alone, and not as agent of the firm.[6]

Ground of Liability.

The general principle on which the firm is held to be liable in cases of this class may be expressed in more than one form. It may be put on the ground "that the firm has, in the ordinary course of its business, obtained possession of the property of other people ,and has then parted with it without their authority;"[7] or the analogy to other cases where the act of one partner binds the firm may be brought out by saying that the firm is to make compensation for the wrong of the defaulting partner, because the other members "held him out to the world as a person for whom they were responsible."[8]

General Test on Principle of Agency.

The question is always whether the wrong-doer was acting as the agent of the firm and within the apparent scope of his agency. If the wrong is extraneous to the course of the partnership business, the other partners are no more liable than any other principal would be for the unauthorized act of his agent in a like case. The proposition that a principal is not liable for the wilful trespass or wrong of his agent[9] requires some extension and qualification; it should rather be that he is not liable if the agent goes out of his way to commit a wrong, whether with a wrongful intention or not. On the one hand, the principal may be liable for a manifest and wilful wrong if committed by the agent in the course of his employment, and for the purpose of serving the principal's interest in the matter in hand;[1] he is also liable for trespass committed by the agent under a mistake of fact such that, if the facts had been as the agent supposed, the act done would have been not only lawful in itself, but

6. *Ex parte* Eyre, 1 Ph. 227; cp. the remark of James, V. C., 7 Eq. 516.
7. Lindley, i. (3d ed.), 322.
8. Per James, V. C.; Earl of Dundonald v. Masterman, 7 Eq. 517.
9. Lindley, i. (3d ed.), 315; Smith, Merc. Law (8th ed.), 146.
1. Limpus v. General Omnibus Co. (Ex. Ch.), 1 H. & C. 526.

within the scope of his lawful authority.[2] On the other hand, he is not liable for acts outside the agent's employment, though done in good faith and with a view to serve the principal's interest.[3]

ARTICLE 25.

IMPROPER EMPLOYMENT OF TRUST MONEYS FOR PARTNERSHIP PURPOSES.

If a partner, being a trustee, improperly employs trust moneys in the business or on the account of the partnership, no other partner is liable therefor to the person beneficially interested,[4] unless he either knew of the breach of trust, or with reasonable diligence might have known it.

In either of the last-mentioned cases the partners having such knowledge or means of knowledge as aforesaid are jointly and severally liable for the breach of trust.[5]

Liability of Partners for Breach of Trust by One not really a Partnership Liability.

This Article is inserted here for convenience, but does not properly belong to the law of partnership. For, since only those partners are liable who are personally implicated in the breach of trust by their own knowledge or culpable ignorance, it can hardly be said that the firm is liable, or that the individual partners are liable as partners. They are only joint wrong-doers, to whom the fact of their being in partnership has furnished an occasion of wrong-doing.

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2. Bayley v. Manchester, etc., Railway Co. (Ex. Ch.), L. R. 8 C. P. 148.

3. Poulton v. L. & S. W. R. Co., L. R. 2 Q. B. 534; Allen v. L. & S. W. R. Co., L. R. 6 Q. B. 65; Bolingroke v. Swindon Local Board L. R. 9 C. P. 575. See, generally, Agency, *ante*, in this volume.

4. We still want a convenient term of art to replace the harsh and cumbrous *cestui que trust*. *Trustor* was long ago suggested by Mr. Humphreys, and it is difficult to see why it has not found favor.

5. Lindley, i. (3d ed.), 328; Gilm Part. 334 *et seq.*

CHAPTER VI.

OF THE RELATIONS OF PARTNERS TO ONE ANOTHER.

ARTICLE 26.

TERMS OF PARTNERSHIP MAY BE VARIED ONLY BY CONSENT OF ALL PARTNERS.

Where the mutual rights and duties of partners have been determined by a special contract between them, such contract may be rescinded or varied by the consent of all the partners, but not otherwise.[1]

Such consent may either be express or inferred from a uniform course of dealing.[2]

ILLUSTRATIONS.

1. It is agreed between partners that no one of them shall draw or accept bills in his own name without the concurrence of the others. Afterwards they habitually permit one of them to draw and accept bills in the name of the firm without such concurrence. This course of dealing shows a common consent to vary the terms of the original contract in that respect.[3]

2. Articles of partnership provide that a valuation of the partnership property shall be made on the annual account day, for the purpose of settling the partnership accounts. The valuation is constantly made in a particular way for the space of many years, and acted upon by all the partners for the time being. The mode of valuation thus adopted cannot, after this course of dealing, be disputed by any partner or his representatives, though no particular mode of valuation is prescribed by the partnership articles, or even if the mode adopted is inconsistent with the terms of the articles.[4]

3. It is the practice of a firm, when debts are discovered to be bad, to debit them to the profit and loss account of the current year, without regard to the year in which they may have been reckoned as assets. A partner dies, and, after the accounts have been made up for the last year

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1. As to the usual clauses in articles of partnership, see 1 Lind. Part. (Ewell's ed.), *411 *et seq.*, and notes.

2. Slightly altered form I. C. A. 252; Const v. Harris, Turn. & R. 496, 517; Lindley, ii. (3d ed.), 844.

3. Lord Eldon in Const v. Harris, Turn. & R. 523.

4. Coventry v. Barclay, 3 D. J. S. 320.

of his interest in the firm, it is discovered that some of the supposed assets of that year are bad. His executors are entitled to be paid the amount appearing to stand to his credit on the last account day, without any deduction for the subsequently discovered loss.[5]

Variations, when assented to, binding on Partner's Representatives.

It is an obvious corollary of the rule here set forth that persons claiming an interest in partnership property as representatives or assignees of any partner who has assented expressly or tacitly to a variation of the original terms of partnership are bound by his assent, and have no ground to complain of those terms having been departed from.[6]

ARTICLE 27.

PARTNERSHIP PROPERTY.[7]

The partners in any firm are owners in common [or joint owners without benefit of survivorship?] [8] of all property and valuable interests originally brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business. Such property and interests are called partnership property.[9]

Explanation.—The legal estate in land which is partnership property is held and devolves according to the general rules of the law of real property, but in trust, so far as necessary, for the persons beneficially interested in such land under this Article.[1]

Exception.—Where co-owners of an estate or interest in land, not being itself partnership property, are partners as to profits made by the use of such land, and purchase other land out of such profits, to be used in like manner, the land so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners.[2]

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5. *Ex parte* Barber, 5 Ch. 687.

6. Const v. Harris, Turn. & R. 524.

7. See, generally, Gilm. Part. 127 *et seq.*; 1 Lind. Part. (Ewell's ed.), Ch. 4.

8. They are neither tenants in common nor joint tenants. As to the nature and extent of their interests. See Gilm. Part. 170 *et seq.*

9. Altered from I. C. A. 253, sub-s. 1

1. Lindley, i. (3d ed.), 685. See Gilm. Part. 146.

2. See Illustration 6.

ILLUSTRATIONS.

1. Land bought in the name of one partner, and paid for by the firm or out of the profits of the partnership business,[3] is *prima facie* partnership property.[4]

2. One partner in a firm buys railway shares in his own name, and without the authority of the other partners, but with the money and on account of the firm. These shares are partnership property.[5]

3. The good-will of the business carried on by a firm, so far as it has a salable value, is partnership property.

4. A and B take a lease of a colliery for the purpose of working it in partnership, and do so work it. The lease is partnership property.

5. A and B, being tenants in common of a colliery, begin to work it as partners. This does not make the colliery partnership property.[6]

6. If, in the case last stated, A and B purchase another colliery, and work it in partnership on the same terms as the first, the purchased colliery is not partnership property, but A and B are co-owners of it for the same shares and interests as they had in the old colliery.[7]

7. W., a nurseryman, devises the land on which his business is carried on and bequeaths the good-will of the business to his three sons as tenants in common in equal shares. After his death the sons continue to carry on the business on the land in partnership. The land so devised to them is partnership property.[8]

8. A is the owner of a cotton mill. A, B, and C enter into partnership as cotton spinners, and it is agreed that the business shall be carried on at this mill. A valuation of the mill, fixed plant, and machinery is made, and the ascertained value is entered in the partnership books as A's capital, and he is credited with interest upon it as such in the accounts. During the partnership the mill is enlarged and improved, and other lands acquired and buildings erected for the same purposes, at the expense of the firm. The mill, plant, and machinery, as well as the lands afterwards purchased and the buildings thereon, are partnership property; and if, on a sale of the business, the purchase money of the mill, plant, and machinery exceeds the value fixed at the commencement of the partnership, the excess is divisible as profits of the partnership business.[9]

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3. Nerot v. Burnand, 4 Russ. 247, 2 Bli. (N. S.) 215. See Gilm. Part. 128, 129.

4. Wedderburn v. Wedderburn, 22 Beav. 104; Lindley i. (3d ed.), 663-7. See more, as to good-will, in Chap. viii. below Art. 57.

5. *Ex parte* Hinds, 3 De G. & Sm. 603.

6. Lindley, i. (3d ed.), 671, 673; Crawshay v. Maule, 1 Swanst. 495, 518, 523. *A fortiori*, where the colliery belongs to A alone before the partnership. Burdon v. Barkus, 4 D. F. J. 42.

7. Implied in Steward v. Blakeway, 4 Ch. 603; though in that case it was treated as doubtful if there was a partnership at all.

8. Waterer v. Waterer, 15 Eq. 402.

9. Robinson v. Ashton, 20 Eq. 25.

ARTICLE 28.

PROPERTY BOUGHT WITH PARTNERSHIP MONEY.

Unless a contrary intention appears, by express agreement or by the nature of the transaction, property bought with money belonging to the firm is deemed to have been bought on account of the firm.[1]

ILLUSTRATIONS.

1. L. and M. are partners. M., having contracted for the purchase of lands called the T. estate, asks L. to share in it, which he consents to do. The purchase money and the amount of a subsisting mortgage debt on the land are paid out of the partnership funds, and the land is conveyed to L. and M. in undivided moieties. An account is opened in the books of the firm, called "the T. estate account," in which the estate is debited with all payments made by the firm on account thereof, and credited with the receipts. The partners build each a dwelling house at his own expense on parts of the land, but no agreement for a partition is entered into. The whole of the estate is partnership property.[2]

2. Land is bought with partnership money on account of one partner, and for his sole benefit, he becoming a debtor to the firm for the amount of the purchase money. This land is not partnership property.[3]

Description of Interest of Partners in Partnership Property.

It is not quite clear whether the interest of partners in the partnership property is more correctly described as a tenancy in common or a joint tenancy without benefit of survivorship, but the difference appears to be merely verbal.[4]

It will be observed that the acquisition of land for partnership purposes need not be an acquisition by purchase to make the land partnership property. Land coming to partners by descent or devise will equally be partnership property if, in the language of James, L. J., it is "substantially involved in the business."[5]

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1. 1 Lind. Part. (Ewell's ed.), *323, and notes.

2. *Ex parte* McKenna (Bank of England Case), 3 D. F. J. 645.

3. 3 D. F. J. 659; Smith v. Smith, 5 Ves. 189.

4. Lindley, i. (3d ed.), 680. See Gilm. Part. 170 *et seq.* See co-ownership and copartnership compared in 1 Lind. Part. (Ewell's ed.), 52 *et seq.*

5. 15 Eq. 406; see Illustration 7 to Art. 27.

ARTICLE 29.

CONVERSION INTO PERSONAL ESTATE FOR SOME PURPOSES OF LAND HELD AS PARTNERSHIP PROPERTY.[6]

Where land has become partnership property, it is treated as between the partners (including the representatives of a deceased partner), and also as between the real and personal representatives of a deceased partner, as personal and not real estate, unless a contrary intention appears either by express agreement or by the conduct of the partners.[7]

ARTICLE 30.

CONVERSION OF JOINT INTO SEPARATE ESTATE, OR, CONVERSELY, BY AGREEMENT OF PARTNERS.

Partners may at any time, by agreement between themselves, convert partnership property into the several property of any one or more of the partners, or the several property of any partner into partnership property.

Such conversion, if made in good faith, is effectual, not only as between the partners, but as against the creditors of the firm and of the several partners.[8]

Exception.—If the firm or the partner whose separate estate is concerned becomes bankrupt or is insolvent after any such agreement, and before it is completely executed, the property is not converted.[9]

ILLUSTRATIONS.

A and B dissolve a partnership which has subsisted between them, and A takes over the property and business of the late firm. A afterwards becomes bankrupt. The property taken over by A from the late partner-

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6. By the Am. rule partnership realty is converted into personality so far as is necessary for carrying on firm's business and payment of firm's bills. Gilm. Part. 155.

7. Lindley, i. (3d ed.), 687-690 (on the balance of authorities, whic hsee there collected); Gilm. Part. 154; Kindersley, V. C., Darby v. Darby, 3 Drew. 495, 506; and see 4 Ch. 609.

8. Lindley, i. (3d ed.), 674; 1 id. (Ewell's ed.), 334, and notes; Campbell v. Mullett, 2 Swanst. 575, 584.

9. Lindley, i. (3d ed.), 677; *Ex parte* Kemptner, 8 Eq. 286.

ship has become his separate estate, and the creditors of the firm cannot treat it as joint estate in the bankruptcy.[1]

ARTICLE 31.

WHAT IS A PARTNER'S SHARE.

The share of a partner in the partnership property, at any given time, is the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had been discharged.[2]

ILLUSTRATIONS.

F. and L. are partners and joint tenants of offices used by them for their business. F. dies, having made his will, containing the following bequest: "I bequeath all my share of the leasehold premises . . . in which my business is carried on . . . to my partner, L." Here, since the tenancy is joint at law, "my share" can mean only the interest in the property which F. had as a partner at the date of his death—namely, a right to a moiety, subject to the payment of the debts of the firm; and, if the debts of the firm exceed the assets, L. takes nothing by the bequest.[3]

Rules as to Relations of Partners in Absence of Special Agreement.

Unless any different agreement appears, the interest of partners in the partnership property, and their mutual rights and duties in relation to the partnership, are determined by the rules stated in the following Articles numbered thirty-two to thirty-nine, inclusive.

ARTICLE 32.

PRESUMED EQUALITY OF SHARES.

Subject to the right of each partner to be credited in ac-

1. *Ex. parte* Ruffin, 6 Ves. 119; see, also, the Illustrations to Art. 75, below, where more complex cases are given. The question whether partnership property has been converted into separate property occurs in fact chiefly, if not exclusively, in the administration of insolvent partners' estates.

2. Lindley, i. (3d ed.), 681; 1 id. (Ewell's ed.), *339, and notes; Gilm. Part. 170 *et seq.*

3. Farquhar v. Hadden, 7 Ch. 1.

count with the firm with the amount of capital actually brought in by him, and with the amount of any indemnity he may be entitled to under the next following Article, the shares of all the partners are presumed to be equal; and all the partners are entitled to share equally in the profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the partnership.[4]

ILLUSTRATIONS.

A and B, solicitors, carrying on business separately, are jointly retained to defend certain actions. This they do, conducting different parts of the business. Unless any different agreement is proved, the profits of the whole business are equally divisible between A and B.[5]

Form of the Rule as to Equality of Partners' Shares—Otherwise expressed in Indian Act.

The form in which the rule is here expressed is determined by the usual mode of keeping partnership accounts, in which the firm is treated as a fictitious person distinct from its members, and the capital brought in by each member is a debt due to him from the firm. In a mercantile view the debts of the firm to individual partners for capital and advances must be allowed for, as well as its debts to outside creditors, in order to ascertain the amount of its divisible property; and it is only to the available property of the firm as thus ascertained that the presumption of equal interest as between the partners applies. The Indian Contract Act (s. 253, sub-s. 1) gives the rule in a less artificial form:

"The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss."

ARTICLE 33.

RIGHT OF PARTNER TO INDEMNITY AND CONTRIBUTION.

Every partner is entitled to be indemnified in account

4. Lindley, i. (3d ed.), 695, 821 *seq.*; id. (Ewell's ed.), *348, and note.

5. Robinson v. Anderson, 7 D. M. G. 239.

with the firm for payments made and for personal liabilities incurred by him—

a. In the ordinary and proper conduct of the business of the firm.[6]

b. In or about anything necessarily done for the preservation of the business or property of the firm.[7]

This Right is independent of Agency.

Generally speaking, every partner is the agent of the firm for the conduct of its business (Articles 17-21, above), and as such is entitled to indemnity on the ordinary principles of the law of agency.[8] But the rights of a partner to contribution go beyond this: he may charge the firm with moneys necessarily expended by him for the preservation or continuance of the partnership concern.[9] This right must be carefully distinguished from the power of borrowing money on the credit of the firm, of which it is altogether independent.[1] It arises only where a partner has incurred expense which under the circumstances, and having regard to the nature of the business, was absolutely necessary, and the firm has had the benefit of such expense; as, where the advances are made to meet immediate debts of the firm (which is the most frequent case), or to pay the cost of operations without which the business cannot go on, such as sinking a new shaft when the original workings of a mine are exhausted.[2]

Interest allowed—Limit of Contribution may be fixed by Agreement.

Where the right to contribution is established, interest is allowed on the amount advanced at the rate of five per cent.[3] The total amount recoverable is not necessarily limited by the nominal capital of the partnership, for the expenditure on existing undertakings cannot be measured by the extent of the capital.[4] On the other hand, the limit of contribution may be fixed beforehand by express agreement among the members of a firm, and in that case no partner can call upon the others to exceed it, how-

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6. Lindley, i. (3d ed.), 779 *seq.* 801; id. (Ewell's ed.), 367 *et seq.*; Gilm. Part. 387.

7. *Ex parte* Chippendale (German Mining Company's Case), 4 D. M. G. 19; Burdon v. Barkus, 4 D. F. J. 42, 51; Gilm. Part. 387.

8. See Agency, *ante.*

9. *Ex parte* Chippendale (German Mining Company's Case), 4 D. M. G. 19; Burdon v. Barkus, 4 D. F. J. 42, 51.

1. D. M. G. 35, 40.

2. Burdon v. Barkus, *supra*; *Ex parte* Williamson, 5 Ch. 309, 313; and the other cases cited in Lindley, i. (3d ed.), 786, n.

3. *Ex parte* Chippendale, 4 D. M. G. 36, 43; Sargood's Claim, 5 Eq. 43.

4. *Ex parte* Chippendale, 4 D. M. G. 42.

ever great may have been the amount of his own outlay on behalf of the firm.[5] This has nothing to do with the obligations of the partners to third persons, and accordingly does not affect the rule that "as to the rest of the world," unless the particular creditor has agreed to look only to some particular fund, "each partner is liable for the whole amount of the debts of the partnership."[6]

ARTICLE 34.

RIGHT OF PARTNER TO TAKE PART IN BUSINESS.

"Each partner has a right to take part in the management of the partnership business."[7]

Although it is the rule, in the absence of special agreement, that "one partner cannot exclude another from an equal management of the concern,"[8] yet it is "perfectly competent," and in practice very common, "for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others;"[9] and in that case the special agreement must be observed.

ARTICLE 35.

DUTY OF GRATUITOUS DILIGENCE IN PARTNERSHIP BUSINESS.

"Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business."[1]

This rule, like the preceding, may be, and often is, departed from by express agreement. The second branch of it does not prevent a partner from recovering *compensation* for the extra trouble thrown upon him by a copartner who has disregarded the first branch by wilful inattention to business.[2]

ARTICLE 36.

POWER OF MAJORITY TO DECIDE DIFFERENCES.

Where differences arise as to matters in the ordinary course of the partnership business, they are to be decided by

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5. Worcester Corn Exchange Company, 3 D. M. G. 180.
6. Lindley, i. (3d ed.), 389; Gilm. Part. 234.
7. I. C. A. 253, sub-s. 3.
8. Rowe v. Wood, 2 Jac. & W. 558.
9. Lindley, i. (3d ed.), 567; Gilm. Part. 362.
1. I. C. A. 253, sub-s. 4; Lindley, i. (3d ed.), 794; Gilm. Part. 373, 384.
2. Airey v. Borham, 29 Beav. 620; Gilm. Part. 384.

a majority of the partners;[3] but the decision must be arrived at in good faith for the interest of the firm as a whole, and not for the private interest of all or any of the majority,[4] and every partner must have an opportunity of being heard in the matter.[5]

This rule extends to powers conferred on a majority of the partners by express agreement.[6]

ARTICLE 37.

CHANGE IN NATURE OF BUSINESS REQUIRES CONSENT OF ALL.

No change can be made in the nature of the partnership business except with the consent of all the partners.[7]

This is one of the rules of partnership law which applies equally to companies; and in that application it is of great importance. "The governing body of a corporation that is in fact a trading partnership cannot, in general, use the funds of the community for any purpose other than those for which they were contributed."[8]

But it would not be relevant here to pursue this subject, on which the present writer has touched elsewhere.[9]

ARTICLE 38.

NEW PARTNER NOT ADMITTED WITHOUT CONSENT OF ALL.

"No person can be introduced as a partner without the consent of all those who for the time being are members of the firm."[1]

Assignment of Share of Profits.

This is given by Mr. Justice Lindley as "one of the fundamental principles of partnership law." The reason of it is that the contract of part-

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3. Verbally altered from I. C. A. 253, sub-s. 5; Gilm. Part. 364; 1 Lind. Part. (Ewell's ed.), 314.

4. Gilm. Part. 364.

5. 1 Lind. Part. (Ewell's ed.), 315.

6. Const v. Harris, Turn. & R. 496, 518, 525; Blisset v. Daniel, 10 Ha. 493, 522, 527. See the section "Of the Powers of Majorities," Lindley, i. (Ewell's ed.), 618-630.

7. Natusch v. Irving, Lindley, i. (3d ed.), 622; id. (Ewell's ed.), 315; Const v. Harris, Turn. & R. 117; I. C. A. 253, sub-s. 5.

8. Wickens, V.-C., in Pickering v. Stephenson, 14 Eq. 322, 340.

9. Pollock's Principles of Contract, 90, 104.

1. Lindley, i. (3d ed.), 717; almost in the same words is I. C. A. 253, sub-s. 6; Gilm. Part. 71, 197.

nership is presumed to be founded on personal confidence between the partners, and therefore not to admit of its rights and duties being transferred, as a matter of course, to representatives or assignees. A partner can, indeed, assign or mortgage to a stranger his interest in the profits of the firm; and the assignee or mortgagee will thereby acquire "a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor." [2] It is at least doubtful whether he can call on the other partners to account with him, and his claim is subject to all their existing rights.[3]

"If the partnership is at will, the assignment dissolves it; and if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution."

Sub-Partnership.

An unauthorized attempt by one partner to admit a new member into the firm, otherwise than by assignment of his share, would have, at most, the effect of creating a *sub-partnership* between himself and the new person; that is, there would be as between themselves a partnership in his share of the profits of the original firm. But as against the original firm itself the new-comer would have no rights whatever.[4]

Shares transferable by Agreement.

On the other hand, the interest of all or any of the partners may be made assignable or transmissible by express agreement; and such agreement may be embodied, once for all, in the original constitution of the partnership.[5]

ARTICLE 39.

CUSTODY AND INSPECTION OF PARTNERSHIP BOOKS.

The partnership books must be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner is entitled to have access to them, and to inspect and transcribe the same, or any of them, when he may think proper.[6]

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2. Lindley, i. (3d ed.), 718, 719.

3. Kelly v. Hutton, 3 Ch. 703.

4. Lindley, i. (3d ed.), 55; Brown v. De Tastet, Jac. 284.

5. Lindley, i. (3d ed.), 719.

6. Greatrex v. Greatrex, 1 De G. & Sm. 692, see the terms of the order there; Gilm. Part. 371; Lindley, i. (3d ed.), 828. Where a firm has more than one place of business, it should always be expressly provided by the partnership articles which shall be considered the principal place of business and where the books are to be kept.

It must be observed that this rule, like the foregoing ones from Art. 32 onwards, is subject to any special agreement that may be made between the partners.

ARTICLE 40.

PARTNER CANNOT BE EXPELLED UNLESS UNDER EXPRESS POWER.

No majority of the partners can expel any partner, unless a power to do so has been conferred by express agreement between the partners.[7]

Where such power is conferred, it must be exercised only in good faith with a view to the benefit of the firm,[8] and the partner whom it is sought to expel must have an opportunity of being heard.[9]

Effect of attempted irregular Expulsion.

If it is attempted to expel a partner contrary to this rule—as, for instance, without hearing him—the attempted expulsion is merely void. The party does not cease to be a partner, and therefore sustains no loss in contemplation of law, and has no cause of action for damages:[1] his remedy is to claim reinstatement in his rights as a partner, which he can effectually do.[2]

It is difficult to say how the Court would treat a clause expressly giving power to expel a partner not only without assigning specific reasons, but without hearing him. There can be little doubt that at one time it would have been held void. At the present day it seems more likely that effect would be given to it, if such appeared to be the real intention of th parties; but at any rate the clearest and most express words would be required to show such an intention.

ARTICLE 41.

RETIREMENT FROM PARTNERSHIP FOR A TERM ONLY BY CONSENT.

Where a partnership has been entered into for a fixed

7. 2 Lind. Part. (Ewell's ed.), 427, 574.

8. Compare Art. 35, above; Blisset v. Daniel, 10 Ha. 493.

9. Wood v. Wood, L. R. 9 Ex. 190; Lindley, ii. (3d ed.), 870; id. (Ewell's ed.), 427, 574, 575.

1. Wood v. Wood, last note.

2. Blisset v. Daniel, 10 Ha. 493.

term, no partner can retire from it during such term, except with the consent of all the partners, or in the exercise of an option previously conferred by express agreement.[3]

ARTICLE 42.

RETIREMENT FROM PARTNERSHIP AT WILL.

Where no fixed term has been agreed upon for the duration of the partnership, any partner may retire from it at any time [and for any reason], upon giving express notice of his intention so to do to all the other partners.[4]

Where the partnership was originally constituted by deed, it is doubtful whether such notice must be under seal.[5]

ARTICLE 43.

WHERE PARTNERSHIP FOR TERM IS CONTINUED OVER, CONTINUANCE ON OLD TERMS PRESUMED.

Where a partnership entered into for a fixed term is continued after the term has expired, and without any new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as consistent with the right of any partner to determine the partnership at will.[6]

A continuance of the business by the acting partner or partners, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.[7]

ILLUSTRATIONS.

1. A clause in partnership articles entered into between A and B, for a fixed term, provides that, "in case either of the said partners shall depart this life during the said copartnership term," the surviving partner

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3. I. C. A. 253, sub-s. 9 (slightly altered); Lindley, i. (3d ed.), 757.

4. Gilm. Part. 570.

5. Lindley, i. (3d ed.), 232, 233; Crawshay v. Maule, 1 Swanst. 508. See, further, as to this, Art. 47, below; also Gilm. Part. 570.

6. I. C. A. 256 (slightly altered); Lindley, ii. (3d ed.), 847; id. (Ewell's ed.), 410.

7. Parsons v. Hayward, 4 D. F. J. 474; Gilm. Part. *supra*.

shall purchase his share at a fixed value. A and B continue their business in partnership after the expiration of the term. This clause is still applicable on the death of either of them.[8]

2. Articles for a partnership for one year contain an arbitration clause, and the partnership is continued beyond the year. The arbitration clause is still binding.[9]

3. A and B are partners for seven years, A taking no active part in the business. After the end of the seven years B continues the business, in the name, on the premises, and with the property of the firm, and without coming to an account. The partnership is not dissolved, and A is entitled to participate, on the terms of the original agreement, in the profits thus made by B.[1]

4. Partnership articles provide that a partner wishing to retire shall give notice of his intention a certain time beforehand. If the partnership is continued beyond the original term, this provision does not hold good, as not being consistent with a partnership at will.[2]

Where Business continued by surviving Partners.

The same rule has been substantially acted upon in the case of a business being continued by the surviving partners after the death of a member of the original firm;[3] the court inferred as a fact, from their conduct, that the business was continued on the old terms; but it is probably safe to assume that here, also, if there were nothing more than a want of evidence to the contrary, a continuance on the old terms would be presumed.

ARTICLE 44.

PARTNERS MUST ACT FOR COMMON ADVANTAGE.

"Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives."[4]

This is a fundamental rule, for which it would be idle to cite specific authority.

Where written partnership articles are entered into, a clause to this

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8. Essex v. Essex, 20 Beav. 442.

9. Gillett v. Thornton, 19 Eq. 599.

1. Parsons v. Hayward, 4 D. F. J. 474.

2. Featherstonhaugh v. Fenwick, 17 Ves. 307; Cark v. Leach, 32 Beav. 14, 1 D. J. S. 409; see the M. R.'s judgment, 32 Beav. 21.

3. King v. Chuck, 17 Beav. 325.

4. I. C. A. 257; 1 Lind. Part. (Ewell's ed.), 303 *et seq.*, and notes.

effect is almost always inserted. There is no doubt, however, that the obligation of *uberrima fides* is incidental to the nature of the partnership contract, and the only object of expressing it on these occasions is to remind the partners of the duties imposed on them by the general law. The same remark applies to several other things which are usually expressed in such instruments. The practice is not altogether consistent with the general principles of conveyancing, but appears in this case to be reasonable and useful.

ARTICLE 45.

PARTNERS MUST NOT MAKE PRIVATE GAIN BY PARTNERSHIP TRANSACTIONS.

Every partner must account to the firm for any benefit derived by him from a transaction concerning the partnership.[5]

ILDUSTRATIONS.

1. A, B, and C are partners in trade. C, without the knowledge of A and B, obtains for his sole benefit a renewal of the lease of the house in which the partnership business is carried on. A and B may, at their option, treat the renewed lease as partnership property.[6]

It would [probably] make no difference if C had given notice to A and B that he intended to apply for a renewal of the lease for his own exclusive benefit.[7]

2. A, B, C, and D are partners in the business of sugar refiners. C is the managing partner, and also does business separately, with the consent of the others, as a sugar dealer. He buys sugar in his separate business and sells it to the firm, at a profit, at the fair market price of the day, but without letting the other partners know that the sugar is his. The firm is entitled to the profit made on every such sale.[8]

3. A, B, and C acquire the lease of certain works for the purposes of a business carried on by them in partnership, A conducting the transaction with the former lessees on behalf of the firm. The former lessees, being anxious to find a responsible assignee and get the works off their hands, pay a premium to A. A must account to his partners for the money thus received.[9]

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5. I. C. A. 258 (slightly altered); 1 Lind. Part. ib.

6. Featherstonhaugh v. Fenwick, 17 Ves. 298; I. C. A. 258; Illust. *a*.

7. Clegg v. Edmondson, 8 D. M. G. 787, 807.

8. Bentley v. Craven, 18 Beav. 75.

9. Fawcett v. Whitehouse, 1 Russ. & M. 131.

Duties of surviving Partners in this Respect.

This rule holds good as between a surviving partner or surviving partners and the representatives of a deceased partner until the affairs of the firm have been completely wound up; thus, if there are leaseholds belonging to the partnership, and the surviving partner renews the lease before his relations with the representatives of the deceased partner are completely determined, the renewed lease must be treated as partnership property.[1]

Parallel Rule in Agency.

The general principle is one of those which the law of partnership takes from agency, considering each partner as agent for the firm; or it is, perhaps, better to say that it is established in both these branches of the law on similar grounds. The rule that an agent must not deal on his own account, or make any undisclosed profit for himself in the business of his agency, is a stringent and universal one.[2]

ARTICLE 46.

PARTNER MUST NOT COMPETE WITH FIRM.

"If a partner, without the consent of the other partners, carries on [either openly or secretly] any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby."[3]

This is an elementary rule analogous to the last. It follows that no partner can, without the consent of the rest, be a member of another firm carrying on the like business in the same field of competition; and if that consent is given he is limited by its terms. And if special knowledge is acquired by him as a member of the one firm he must not use

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1. Clements v. Hall, 2 De G. & J. 173, 186. The surviving partner is sometimes called a trustee, or *quasi* trustee, of the partnership property. But this use of the term is at least doubtful; see Lord Westbury's remarks in Knox v. Gye, L. R. 5 H. L. 675; Alder v. Fouraere, 3 Swanst. 489.

2. Story on Agency, §§ 210, 211; Parker v. McKenna, 10 Ch. 96; Hay's Case, Ib. 593; Dunne v. English, 18 Eq. 524. See, *ante*, Agency.

3. I. C. A. 259; Lindley, i. (3d ed.), 611-613; id. (Ewell's ed.), 312, and notes.

it for the benefit of the other and to the prejudice of the first. And this equally holds if several members, or even all the members but one, are common to both firms.

If A, B, C, and D are the proprietors of a morning newspaper, and A, B, and C the proprietors of an evening newspaper, for which the types and plant of the morning paper are used by agreement, D may restrain A, B, and C from first publishing in A, B, and C's evening paper intelligence obtained by the agency of the morning paper, and at the expense of the firm of A, B, C, and D.[4]

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4. Glassington v. Thwaites, 1 Sim. & St. 124.

PART II.

THE DISSOLUTION OF PARTNERSHIPS.

CHAPTER VII.

OF DISSOLUTION AND ITS CONSEQUENCES.

Where there is no agreement to the contrary between the partners, the dissolution of a partnership takes place in any of the events specified in the four following articles:

ARTICLE 47.

DISSOLUTION OF PARTNERSHIP BY RETIREMENT OF PARTNER.

If any partner gives notice to the other or others of his intention to dissolve the partnership, the partnerships is dissolved as from the date of such notice.

"Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party.[1] By that notice the partnership is dissolved to this extent: that the Court will compel the parties to act as partners in a partnership existing only for the purpose of winding up the affairs."[2]

The dissolution takes place as from the date of the notice, and without regard to the state of mind of the partner to whom the notice is given. Insanity on his part does not make it less effectual.[3] Of insanity as a special ground of dissolution, when the partnership is not a will, we shall speak presently. A valid notice of dissolution, once given, cannot be withdrawn except by consent of all the partners.[4]

Where a partnership has been entered into for a fixed term, the partnership is at the end of that term dissolved "by effluxion of time," without any further act or notice, except in the cases mentioned in Art. 43, above.

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1. Gilm. Part. 570; 2 Lind. Part. (Ewell's ed.), 571, and cases cited.
2. Crawshay v. Maule, 1 Swanst. 508.
3. Mellersh v. Keen, 27 Beav. 236; Jones v. Lloyd, 18 q. 265.
4. Jones v. Lloyd, 18 Eq. 271.

ARTICLE 48.

BY BANKRUPTCY, ETC., OF PARTNER.[5]

The alienation of any partner's share by operation of law dissolves the partnership.

ILLUSTRATIONS.

If a partner becomes bankrupt or is outlawed, or if his interest in the partnership property is taken in execution,[6] or if a female partner marries[7] without settling her share in the partnership to her separate use,[8] the partnership is thereby dissolved.[9]

ARTICLE 49.

BY DEATH OF PARTNER.[1]

The death of any partner dissolves the partnership.[2]

Explanation.—In the absence of any previous agreement to the contrary, the partnership is dissolved in any of the cases mentioned in the three foregoing Articles as between

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5. Gilm. Part. 575.

6. Lindley, i. (3d ed.), 712. Before the Judicature Acts the taking of partnership property in execution for a partner's separate debt was an inconvenient and complicated process. The sheriff could sell only the judgment debtor's interest in the goods seized, and the purchaser's title was subject to all the rights of the other partners, which could be ascertained only by a distinct suit in equity. See Lindley, i. (3d ed.), 708 *seq.* The matter may now be dealt with by a Judge's order made on interpleader summons at chambers. It is referred to a Master to take the partnership accounts, and all further questions are reserved till after his report. At the same time a solvent partner may (it is suggested) be appointed receiver and manager of the partnership assets, with a direction to account to the Master when required.

7. See Gilm. Part. 576.

8. There appears to be no reason why such a settlement should not be made; and, if it is made, there is no reason why the partnership should be dissolved. And *qu.* whether s. 1 of the Married Women's Property Act, 1870, has not the same effect even if there is no settlement. See Lindley, i. (3d ed.), 86, 87. Re Childs, 9 Ch. 508, shows that for administrative purposes at least, a wife entitled, for her separate use, to a share of the profits of her husband's business may be considered as his partner. Consult the local statutes.

9. Lindley, i. (3d ed.), 241.

1. Gilm. Part. 263, 573; Solomon v. Kirkwood, 55 Mich. 259; Gilm. Cases Part. 589. No notice or judicial decree is necessary. Id.

2. Ib. i. (3d ed.), 242.

all the members of the firm, and not only to that partner who retires, or who dies, or whose share becomes alienated.

ARTICLE 50.

BY ASSIGNMENT OF PARTNER'S SHARE IN PARTNERSHIP AT WILL.

If any partner assigns or encumbers his interest in the property or profits of the firm, the partnership not being for a fixed term, the partnership is thereby dissolved.[3]

ARTICLE 51.

BY BUSINESS OF PARTNERSHIP BECOMING UNLAWFUL.

A partnership is in every case dissolved by the happening of an event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.[4]

ILLUSTRATIONS.

1. A and B charter a ship to go to a foreign port and receive a cargo on their joint adventure. War breaks out between England and the country where the port is situated before the ship arrives at the port, and continues until after the time appointed for loading. The partnership between A and B is dissolved.[5]

2. [Where a State law absolutely prohibited circuit judges from practicing law, the election of a member of the firm to that office dissolved the firm by operation of law] [6]

3. A, an Englishman, and domiciled in England, is a partner with B, a domiciled foreigner. War breaks out between England and the country of B's domicile. The partnership between A and B is dissolved.[7]

ARTICLE 52.

CAUSE FOR DISSOLUTION OF PARTNERSHIP BY THE COURT.

The Court,[8] or, in the case of a partner becoming lunatic,

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3. See on Art. 38, above; Gilm. Part. 578.

4. Lindley, i. (3d ed.), 243; I. C. A. 255; Gilm. Part. 578, and cases cited.

5. See Esposito v. Bowden, 7 E. & B. 763.

6. Gilm. Part. 578, citing Justice v. Lairy, 19 Ind. App. 272.

7. Griswold v. Waddington, 15 Johns. 57; 16 Ib. 438.

8. All causes and matters for the dissolution of partnerships, or the taking of partnership accounts, are

the Lord Chancellor,[9] may dissolve the partnership, at the suit of a partner, in any of the following cases:

1. **When a partner is found lunatic** by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind.[1]
2. **When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part** of the partnership contract.[2]
3. When a partner, other than the partner suing, **becomes liable to a criminal prosecution.**[3]
4. When a partner, other than the partner suing, **so conducts himself in matters relating to the partnership business that it is not reasonably practical for the other partner, or partners, to carry on the business** in partnership with him.[4]
5. When a partner, other than the partner suing, the partnership being for a fixed term, **assigns or encumbers his interest** in the property or profits of the firm.[5]
6. **When the business of the partnership can only be carried on at a loss.**[6]

Dissolution at Suit of Partner of unsound Mind.[7]

It is to be observed that the right of having the partnership dissolved in the case of one partner becoming insane is not confined to his fellow-partners. A dissolution may be sought and obtained on behalf of the

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assigned to the Chancery Division (subject to Rules of Court or orders of transfer) by s. 34 of the Judicature Act, 1873. In the U. S. the proceeding is by bill of equity or other corresponding proceedings.

9. Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70, s. 123.

1. Lindley, i. (3d ed.), 235-238; Gilm. Part. 583; Jones v. Hoy, 2 M. & K. 125; Anon. 2 K. & J. 441; Leaf v. Coles, 1 D. M. G. 171.

2. Whitwell v. Arthur, 35 Beav. 140; Gilm. Part. 583.

3. Essell v. Hayward, 30 Beav. 158; Gilm. Part. 585.

4. Harrison v. Tennant, 21 Beav. 482; Gilm. Part. 585.

5. Art. 38, above; Gilm. Part. 578.

6. Jennings v. Baddeley, 3 K. & J. 78; Gilm. Part. 581.

7. When the incapacity is but temporary the court will not decree a dissolution, but will wait to see whether there be any improvement. Gilm. Part. 583.

lunatic partner himself; and this may be done either by his committee in lunacy under the Lunacy Regulation Act, or, where he has not been found lunatic by inquisition, by an action brought in his name in the Chancery Division by another person as his next friend. In the latter case the court may, if it thinks fit, direct an application to be made in lunacy before finally disposing of the cause.[8]

What Conduct of a Partner is Ground for Dissolution.[9]

It is rather difficult to fix the point at which acts of a partner tending to shake the credit of the firm and the other partners' confidence in him become sufficient ground for demanding a dissolution. The fact that a particular partner's continuance in the firm is injurious to its credit and custom is not of itself ground for a dissolution where it cannot be imputed to that partner's own wilful misconduct. In a case where one partner had been insane for a time, and while insane had attempted suicide, this was held not to be a cause for dissolution, although it was strongly urged that the credit of the firm could not be preserved if he remained in it.[1] On the other hand, conduct of a partner in the business carried on by the firm and its predecessors, though not in the actual business of the existing firm, which was calculated to destroy mutual confidence among the partners, has been held sufficient ground for a dissolution.[2]

Actual malversation of one partner in the partnership affairs, such as failing to account for sums received,[3] is ground for a dissolution; so is a state of hostility between the partners which has become chronic and renders mutual confidence impossible, as where they have habitually charged one another,[4] or one partner has habitually charged another,[5] with gross misconduct in the partnership affairs.[6]

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8. Jones v. Lloyd, 18 Eq. 265.

9. In cases of fraud, imposition and oppression in the original agreement, the partnership may be declared void *ab initio*. Gilm. Part. 589.

1. Anon. 2 K. & J. 441, 452.

2. Harrison v. Tennant, 21 Beav. 482.

3. Cheemsan v. Price, 35 Beav. 142.

4. Baxter v. West, 1 Dr. & Sm. 173.

5. Watney v. Wells, 30 Beav. 56; Leary v. Shout, 33 Beav. 582.

6. See Atwood v. Maude, 3 Ch. 373; Gilm. Part. 585, and cases cited.

ARTICLE 53.

RIGHTS OF CREDITORS AGAINST APPARENT MEMBERS OF FIRM.

The rights of a creditor of a firm against its apparent members are not affected by any dissolution or change in the firm of which such creditor had not notice.[7]

An advertisement in the "London Gazette" is equivalent to notice as to creditors who were not in fact customers of the firm before the time of the dissolution or change.[8]

Exceptions.—The estate of a partner who dies,[9] or who becomes bankrupt,[1] or of a partner who, not having been known to the creditor to be a partner, retires from the firm,[2] is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.[3]

ILLUSTRATIONS.

1. A and B, partners in trade, agree to dissolve the partnership, and execute a deed for that purpose, declaring the partnership dissolved as from the 1st of January; but they do not discontinue the business of the firm or give notice of the dissolution. On the 1st of February A endorses a bill in the partnership name to C, who is not aware of the dissolution. The firm is liable on the bill.[4]

2. A bill is drawn on a firm in its usual name of the M. Company, and accepted by an authorized agent. A was formerly a partner in the firm, but not to the knowledge of B, the holder of the bill, and ceased to be so before the date of the bill. B cannot sue A upon the bill.[5]

3. A is a partner with other persons in a bank. A dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. A's estate is liable to customers of the bank for the balances due to them at A's death, so far as they still remain due, and for other partnership liabilities incurred before A's death;[6] but not for any debts contracted or liabilities incurred by the firm towards customers after A's death.[7]

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7. Lindley, i. (3d ed.), 421; I. C. A. 264.

8. Lindley, i. (3d ed.), 429, 430; id. (Ewell's ed.), 215. A similar rule is applied in this country. Gilm. Part. 267.

9. Ib. 418.

1. Ib. 419.

2. Lind. i. (3d ed.), 420.

3. See Gilm. Part. 265.

4. Per Lord Brougham; *Ex parte* Robinson, 3 D. & Ch. 388

5. Carter v. Whalley, 1 B. & Ad. 11.

6. Devaynes v. Noble, 1 Mer. 529; Sleech's Case, at p. 539; Clayton's Case, at p. 572.

7. Brice's Case, Ib. 622.

In the case of liabilities of the firm which have arisen after A's death, it makes no difference that at the time when the partnership liability arose the customer believed A to be still living and a member of the firm.[8]

ARTICLE 54.

RIGHT OF PARTNERS TO NOTIFY DISSOLUTION.

On the dissolution of a partnership, or retirement of a partner, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.[9]

In the case referred to it appeared to be the practice of the "London Gazette" office not to insert a notice of dissolution unless signed by all the partners; and the defendant, who had refused to sign a notice, was decreed to do all things necessary for procuring notice of the dissolution to be inserted in the "Gazette."

ARTICLE 55.

CONTINUING AUTHORITY OF PARTNERS FOR PURPOSES OF WINDING UP.

After the dissolution of a firm, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as is necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution,[1] but not otherwise.

Exception.—The firm is in no case bound by the act of a bankrupt [2] partner, except as to any other partner who may be liable under Art. 13 or Art. 14.[3]

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8. Houlton's Case, Ib. 616. The judgment itself in this case is not reported; but it appears by the marginal note and the context that it followed Briee's Case. See, generally, 1 Lind. Part. (Ewell's ed.), *213 *et seq.*, and American com. cited in notes.

9. Troughton v. Hunter, 18 Beav. 470.

1. Lindley, i. (3d ed.), 427, with slight verbal alteration. Gilm. Part. 339; Lyon v. Haynes, 5 M. & Gr. 504, 541.

2. Bankruptcy relates back to the completion of the act of bankruptcy on which the order of adjudication is made. Bankruptcy Act, 1869, s. 11. See, generally, Collier on Bankruptcy.

3. Lindley, ii. 1173.

ILLUSTRATIONS.

1. A and B are partners. A becomes bankrupt. B continues to carry on the trade of the firm, and pays partnership moneys into a bank to meet current bills of the firm. The bank is entitled to this money as against A's trustee in bankruptcy.[4]

2. A and B are partners in trade. A becomes bankrupt. The solvent partner, B, but not other persons claiming through him by representation or assignment, may, notwithstanding the dissolution of the partnership wrought by A's bankruptcy, sell any of the partnership goods to pay the debts of the firm,[5] and the purchaser will be entitled to the entire property in such goods as against A's trustee in bankruptcy.[6]

3. A and B, share-brokers in partnership, buy certain railway shares. Before the shares are paid for they dissolve partnership. Either of them may pledge the shares to the bankers of the firm, to raise the purchase money, and may authorize the bankers to sell the shares to indemnify themselves.[7]

4. A partner authorized to draw bills in the name of the firm may endorse in the name of the firm a bill which has been properly drawn on behalf of the firm, and payable to its order, during the existence of the partnership, notwithstanding that the firm has been dissolved between the dates of the drawing and of the endorsement. The partnership may be said not to be dissolved as to this bill, so as to prevent it from being endorsed by either partner in the name of the firm.[8]

5. A and B, having been partners in a business, dissolve partnership, and A takes over the business and property of the firm. If A gives negotiable instruments in the name of the old firm, then (subject to the rights of creditors of the firm stated in Art. 53) B is not bound thereby[9] unless he has specially authorized the continued use of the name for that purpose.[1]

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4. Woodbridge v. Swann, 4 B. & Ad. 633.

5. Fraser v. Kershaw, 2 K. & J. 496. The authority to sell is "personal to him in his capacity as partner" (p. 501).

6. Fox v. Hanbury, Cow. 445. See, generally, Collier on Bankruptcy.

7. Butchart v. Dresser, 4 D. M. G. 542.

8. Lewis v. Reilly, 1 Q. B. 349; see judgment of Lord Denman, C. J., and Mr. Justice Lindley's note, i. 428. The correctness of the decision has been disputed (Ib. 424; Dixon on Partnership, 147, 499), but it is treated as good law by the Ex. Ch. in Garland v. Jacomb, L. R. 8 Ex. at p. 220. Smith v. Winter, 4 M. & W. 454 (not cited in Lewis v. Reilly), certainly seems to assume the necessity of some evidence of spcial authority to use the partnership name in this way after dissolution even for the purpose of liquidating the affairs of the firm.

9. Heath v. Sansom, 4 B. & Ad. 172.

1. Smith v. Winter, 4 M. & W. 454.

CHAPTER VIII.

RIGHTS OF PARTNERS AFTER DISSOLUTION.

ARTICLE 56.

RIGHTS OF PARTNERS AS TO APPLICATION OF PARTNERSHIP PROPERTY.

"Every partner has a right," as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, **"to have the property of the partnership applied in payment of the debts and liabilities of the firm,"** and to have the surplus assets, after such payment, "applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm;"[1] and for that purpose any partner or his representatives may, upon the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.[2]

ILLUSTRATIONS.

1. One of the partners in a firm becomes bankrupt. All debts due from him to the firm must be satisfied out of his share of the partnership property before recourse is had to such share for payment of debts due either to any of the partners on his private account or to any other person.[3]

2. A creditor of one partner in a firm, on a separate account unconnected with the partnership, takes his share in the partnership property in execution. He is entitled, at most, to the amount of that partner's interest after deducting everything then due from him to the other partners on the partnership account;[4] but, in such deduction, debts due to all or any of the other partners, otherwise than on the partnership account, are not to be included.[5]

3. A and B are partners, having equal shares in their business. A dies,

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1. Lindley, i. (3d ed.), 700; Gilm. Part. 179, 394; Groth v. Kersting, 23 Colo. 213; Gilm. Cor. Part. 484.

2. Common practice; compare I. C. A. 265.

3. Croft v. Pike, 3 P. Wms. 180; and see Ch. xi. Art. 75-78, below.

4. West v. Skip, 1 Ves. Sen. 239, 242; per Lord Mansfield, Fox v. Hanbury, Cowp. at p. 449.

5. Skipp v. Harwood, 2 Swanst. 587; Lindley, i. (3d ed.), 703. See Gilm. Part. 394.

and B continues to employ his share of the partnership capital in the business without authority, thereby becoming liable to A's estate for a moiety of the profits.[6] A's estate is entitled, not only to a moiety of the partnership property, but to a lien upon the other moiety for the share of profits due to the estate.[7]

Nature of the Right as Lien or Quasi-Lien.[8]

The general rule has been thus stated: that, "on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital."[9]

The right of each partner to control, within certain limits, the disposition of the partnership property is a rather peculiar one. It exists during the partnership, and when accounts are taken and the partners' shares ascertained, from time to time, its existence is assumed; but it comes into full play only in the event of a dissolution. It belongs to a class of rights known as *equitable liens*, which have nothing to do with possession, and must, therefore, be carefully distinguished from the *possessory liens* which are familiar in several heads of the common law. The possessory lien of an unpaid vendor, factor, or the like, is a mere right to hold the goods of another man until he makes a certain payment; it does not, as a rule, carry with it the right of dealing with the goods in any way.[1] Equitable lien, on the other hand, is nothing else than the right to have a specific portion of property dealt with in a particular way for the satisfaction of specific claims.

Against whom available.

The lien, or *quasi*-lien,[2] as it is sometimes called, of each partner on the partnership property is available against the other partners, and against all persons claiming an interest in a partner's share as such. We have already seen that an assignee of a partner's share takes it subject to all claims of the other partners (Art. 38). But a purchaser or pledgee of partnership property from a partner, unless he has notice of an actual want of authority to dispose of it, is entitled to assume that his money will be properly applied for partnership purposes, and may rely on the disposing partner's receipt as a complete discharge.[3] Likewise the indi-

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6. See Art. 60, below.
7. Stocken v. Dawson, 9 Beav. 239.
8. See, generally, as to the nature of the partners' so-called lien. Gilm. Part. 179, 400, and cases cited; 1 Lind. Part. (Ewell's ed.), *353 *et seq.*, and notes.
9. Darby v. Darby, 3 Drew. at p. 503.
1. See Page v. Cowasjee Eduljee, L. R. 1 P. C. 145.
2. 25 Beav. 286.
3. Langmead's Trusts.

vidual partners cannot require a judgment creditor of the firm to pursue his remedy against the partnership property before having recourse to the separate property of the partners;[4] for, as we have seen above (on Art. 11), English law does not recognize the firm as having rights or liabilities distinct from those of the individual partners, and a judgment against a firm of partners is nothing else than a judgment against the partners as joint debtors, and is treated like any other judgment of that nature. Creditors, on the other hand, have no specific rights against any property of the firm except such as they may acquire by actually taking it in execution.[5]

Applies only to Partnership Property at Date of Dissolution.

During a partnership, the lien in question attaches to all partnership property for the time being. Upon a dissolution, it extends only to the partnership property existing as such at the date of dissolution. Therefore, if one of two partners dies, and the executors of the deceased partner allow the survivor to continue the business of the firm, there will be no lien in their favor on property acquired by him in this course of business in addition to, or in substitution for, partnership property; and, in the event of the surviving partner's bankruptcy, goods brought into the business by him will belong to his creditors in the new business, not to the creditors of the former partnership.[6] It is probable, however, that a surviving partner who insisted on carrying on the business against the will of the deceased partner's representatives would be estopped from showing that property in his hands, and employed in the business, was not part of the actual partnership assets.[7]

ARTICLE 57.

Sale of Good-Will on Dissolution.

On the dissolution of a partnership every partner has a right, in the absence of any agreement to the contrary, to have the good-will of the business sold for the common benefit of all the partners.[8]

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4. Lindley i. (3d ed.), 541, 700.

5. Stocken v. Dawson, 9 Beav. 239.

6. Payne v. Hornby, 25 Beav. 280, 286, 287.

7. This is given as the general rule in Dixon on Partnership, 493, and the rule in Payne v. Hornby as the exception; and a *dictum* of Lord Hardwicke's is there cited (West v. Skip, 1 Ves. Sen. 244), that the lien extends to stock brought in after the determination of the partnership. But this *dictum* relies on an old case of Bucknal v. Roiston, Pre. Ch. 285, which was a case not of partnership at all, but of a continuing pledge of stock in trade; from which the partner's lien is expressly distinguished in Payne v. Hornby.

8. Lindley, ii. (3d ed.), 885; Gilm. Part. 136 *et seq.*

Rights and Duties of Vendor and Purchaser of Good-Will.

Explanation.—Where the good-will of a business, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are determined by the following rules, in the absence of any special agreement excluding or varying their effect:

a. **The purchaser alone may represent himself as continuing or succeeding to the business of the vendor.**[9]

b. **The vendor may, nevertheless, carry on a similar business in competition with the purchaser, but not under the name of the former firm,** nor so as to represent himself as continuing or succeeding to the same business.[1]

c. **He may publicly advertise his business,** but must not privately or specially solicit the customers of the former firm.[1]

d. **The purchaser may not continue to use the name of the former firm without qualification,** if such use would expose the vendor to be sued as an apparent partner in the business.[2]

e. **The foregoing rules apply to the sale by a retiring partner, or a surviving partner, or the representatives of a deceased partner,** to continuing or incoming partners, or to any other purchaser of the business of the firm, of his or their share or interest in the good-will of the business carried on by the firm.[3]

ILLUSTRATIONS.

1. A, B, and C have carried on business in partnership under the firm of A & Co. A retires from the firm on the terms of the other partners purchasing from him his interest in the business and good-will, and D is taken in as a new partner. B, C, and D continue the business under the

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9. Churton v. Douglas, H. R. V. Johns. 174.

1. Labouchere v. Dawson, 13 Eq. 322.

2. Churton v. Douglas, Johns. 190.

3. The rules are, in fact, established almost entirely by decisions on partnership cases. Labouchere v. Dawson, above, is a case in which no partnership was in question. See, generally, as to good-will, Gilm. Part. 136 *et seq.*; 2 Lind. Part. (Ewell's ed.), 439 *et seq.*, and cases cited in notes.

firm of "B, C & D, late A & Co." A may set up a similar business of his own, next door to them, but not under the firm of A & Co.[4]

2. One of several persons carrying on business in partnership having died, the affairs of the partnership are wound up by the court, and a sale of the partnership assets, including the good-will, is directed. The good-will must not be valued on the supposition that any surviving partner, if he does not himself become the purchaser, can be restrained from setting up the same kind of business on his own account;[5] for "no court can prevent the late partners from engaging in the same business, and therefore the sale cannot proceed upon the same principles as if a court could prevent their so engaging."[6]

Nature and Incidents of "Good-Will."

The term *good-will* is a commercial rather than a legal one, nor is its use confined to the affairs of partnership firms. It is well understood in business, but not easy to define. It has been described as "the benefit arising from connection and reputation,"[7] "the probability of the old customers going to the new firm" which has acquired the business.[8] That which the purchaser of a good-will actually acquires, as between himself and his vendor, is the right to carry on the same business under the old name (with such addition or qualification, if any, as may be necessary for the protection of the vendor from liability or exposure to litigation under the doctrine of "holding out"), and to represent himself to former customers as the successor to that business.[9] Unless there is an express agreement to the contrary, the vendor remains free to compete with the purchaser in the same line of business;[1] and he may publish to the world, by advertisements or otherwise, the fact that he carries on such business. But he may not specially solicit the customers of the old firm to transfer their custom to him,[2] and he must not use the name of the old firm so as to represent that he is continuing, not merely a similar business, but the *same* business: "You are not to say, I am the owner of that which I have sold."[3] Probably the purchasers of the business might successfully ob-

4. Churton v. Douglas, Johns. 174.

5. Hall v. Barrows, 4 D. J. S. at p. 159.

6. Lord Eldon's decree in Cook v. Collingridge, given in 27 Beav. 456, 459. The declarations and directions there inserted contain an exposition of the nature and legal incidents of good-will to which there is still little to add in substance.

7. Lindley, ii. (3d ed.), 884; id. (Ewell's ed.), 439.

8. Lord Romilly, M. R., Labouchere v. Lawson, 13 Eq. at p. 324; and see Llewellyn v. Rutherford, L. R. 10 C. P. 456; Wedderburn v. Wedderburn, 22 Beav. at p. 104.

9. Lindley, ii. (3d ed.), 879; id. (Ewell's ed.), 439 *et seq.*

1. Churton v. Douglas, Johns, 174; Lind. Part. id.

2. Labouchere v. Dawson, 13 Eq. 322.

3. Churton v. Douglas, Johns. 193.

ject even to his carrying on a competing business in his own name alone, if that name had been used as the name of the late firm and had become part of its good-will.[4] These rights of vendors and purchasers of good-will clearly belong to the province of law, and are capable of legal definition; I have accordingly tried to state them distinctly in the explanation annexed to the last Article, but for the reasons already indicated I have not sought to define the term *good-will* itself.

Good-Will does not "survive."

The good-will is a partnership asset and does not survive on the death of a partner.[5]

ARTICLE 58.

Right of Partners to restrain Use of Partnership Name.

After a dissolution, each of the partners in the dissolved firm, or his representatives, may, in the absence of any agreement to the contrary, restrain any other partner or his representatives, from carrying on the same business under the partnership name, until the affairs of the firm have been wound up and the partnership property disposed of.[6]

This is maintained by Mr. Justice Lindley, notwithstanding a certain amount of apparent authority to the contrary,[7] as a necessary consequence of the principle stated in the last Article. If any partner who may require it has a right to have the good-will sold for the common benefit, it cannot be that each partner is also entitled to do that which would deprive the good-will of all salable value. There is express authority to show that, while a liquidation of partnership affairs is pending, one partner must

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4. Churton v. Douglas, Johns. 197, 198. As to the right to the exclusive use of a trade name, see Art. 11, above.

5. The notion of the good-will surviving is expressly contradicted, for instance, in Everett v. Smith, 27 Beav. 446; 2 Lind. Part. (Ewell's ed.), 443.

6. Lindley, ii. (3d ed.), 887; id. (Ewell's ed.), 443 *et seq.*

7. Bank v. Gibson, 34 Beav. 566, looks, at first sight, like a direct authority *contra*. But there it appears that the assets of the firm had been divided by agreement between the late partners, and the affairs of the firm wound up before the suit was brought. The good-will, in fact, had ceased to exist, the partners having practically waived the right of having its value realized. Thus the decision is not inconsistent with Mr. Justice Lindley's reasoning or with the proposition given in the text.

not use the name or property of the partnership to carry on business on his own sole account, since it is the duty of every partner to do nothing to prejudice the salable value of the partnership property until the sale.[8] This question does not in any case affect the independent right of a late partner, who is living and not bankrupt, to restrain the successor to the business from continuing the use of his name therein so as to expose him to the risk of being sued as an apparent partner.[9]

ARTICLE 59.

APPORTIONMENT OF PREMIUM IN CERTAIN CASES WHERE PARTNERSHIP PREMATURELY DISSOLVED.[1]

Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of such term otherwise than by the death of a partner,[2] then, subject to any special agreement between the partners, the Court may order the premium, or a proportionate part thereof, to be repaid.

In fixing the proportion of the premium to be returned, the Court has regard to the conduct of the partners, the terms of the partnership contract, and the length of time during which the partnership has continued.

ILLUSTRATIONS.

1. A and B enter into a partnership for five years, on the terms of A paying a premium of £1,050 to B, £500 immediately and the rest by instalments. In the second year of the partnership term, and before the whole of the premium has been paid, A is adjudicated a bankrupt on the petition of B. B is not entitled to any further payments on account of the premium, the partnership having been determined by his own act, and he may retain only so much of the part already paid to him as the court thinks just.[3]

2. A and B enter into a partnership for a term of years, A paying a premium to B. Long before the expiration of the term B becomes bankrupt.

It has been held that B's estate is entitled to the whole premium, because A bought the right of becoming his partner subject to the

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8. Turner v. Major, 3 Giff. 442.

9. Scott v. Rowland, 20 W. R. 508.

1. See, generally, as to premiums, Gilm. Part. 91.

2. See Lindley, i. (3d ed.), 76, Whincup v. Hughes, L. R. 6 C. P. 78.

3. Hamil v. Stokes, 4 Pri. 161, and better in Dan. 20.

chance of the partnership being prematurely determined by ordinary contingencies, such as death or bankruptcy.[4]

And also that B's estate must return or give credit for a proportionate part of the premium, as the bankruptcy which determined the partnership was B's own act.[5]

3. A and B enter into partnership for fourteen years, B paying a premium to A. In the course of the same year differences arise; there is a quarrel in which, in the opinion of the court, A and B are both to blame; A excludes B from the business and premises of the partnership, and B sues A for a dissolution of partnership and return of the premium. A is entitled to rétain only so much of the premium as bears the same proportion to its whole amount as the time for which the partnership has actually lasted bears to the whole term first agreed upon.[6]

4. A takes B into partnership for seven years, knowing him to be inexperienced in the business, and requires him on that account to pay a premium. After two years A calls on B to dissolve the partnership, on the ground of B's incompetence, and B sues A for a dissolution and the return of an apportioned part of the premium. B is entitled to the return of such a part of the premium as bears the same proportion to the whole sum which the unexpired period of the term of seven years bears to the whde term.[7]

It will be seen from the illustrations that no definite rule can be given which will reconcile the existing authorities. I have therefore stated the jurisdiction as a discretionary one, though I do not know that it has ever been expressly so treated.[8]

ARTICLE 60.

RIGHT OF OUTGOING PARTNER, IN CERTAIN CASES, TO SHARE OF PROFITS AFTER DISSOLUTION.[9]

Where any member of a firm has died, or otherwise ceased to be a partner, and the surviving or continuing partner or partners carry on the business of the firm with his capital

4. Akhurst v. Jackson, 1 Swanst. 85. No stress is laid on the fact that at the commencement of the partnership A knew that B was in embarrassed circumstances, which is the only point on which the case can be distinguished from Freeland v. Stansfeld; see Atwood v. Maude, 3 Ch. at p. 372.

5. Freeland v. Stansfeld, 1 Sm. & G. 479.

6. Bury v. Allen, 1 Coll. 589; the proportion to be returned or allowed for was calculated on the same principle in Astle v. Wright, 23 Beav. 77; Pease v. Hewitt, 31 Beav. 22; Wilson v. Johnstone, 16 Eq. 606.

7. Atwood v. Maude, 3 Ch. 369.

8. See Wilson v. Johnstone, 16 Eq. 606; Atwood v. Maude, 3 Ch. 369; Gim. Part. 91.

or assets, without any final settlement of accounts as between the firm and the outgoing partner or his estate, there, in the absence of any special agreement to the contrary, the outgoing partner or his estate is entitled, at the option of such partner or his representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his capital or assets, or to the amount of such capital or assets with interest thereon at 5 per cent.[1]

Explanation.—How far the profits made since the dissolution are attributable to the outgoing partner's capital is a question to be determined with regard to the nature of the business, the amount of capital employed in it, the skill and industry of each partner taking part in it, and the conduct of the parties generally.[2] There is no fixed rule that the profits are divisible in the same manner as if the partnership had not ceased.[3]

ILLUSTRATIONS.

1. A and B are partners. The partnership is dissolved by consent, and it is agreed that the assets and business of the firm shall be sold by auction. A, nevertheless, continues to carry on the business on the partnership premises, and with the partnership property and capital, and upon his own account. He must account to B for the profits thus made.[4]

2. A and B trade in partnership as merchants. A dies, and B continues the business with A's capital. B must account to A's estate for the profits made since A's death, but the court will make in B's favor such allowance as it thinks just for his skill and trouble in managing the business.[5]

3. A, B, and C are merchants trading in partnership under articles which provide that upon the death of any partner the good-will of the business shall belong exclusively to the survivors. A dies, and B and C pay or account for interest to his legatees upon the estimated value of his share at the time of his death, but do not pay out the capital amount thereof. The firm afterwards makes large profits, but the nature of the business and the circumstances at the time of A's death were such that

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9. See, generally, 2 Lind. Part. (Ewell's ed.), 522 *et seq.*, and notes.

1. Lindley, ii. (3d ed.), 1034 *seq.* Per Lord Cairns, Vyse v. Foster, L. R. 7 H. L. at p. 329.

2. Turner, L. J., in Simpson v. Chapman, 4 D. M. G. at pp. 171, 172, following and approving Wigram, V.-C.'s, exposition in Willett v. Blanford, 1 Ha. 253, 266, 272.

3. Brown v. De Tastet, Jac. 296.

4. Turner v. Major, 3 Giff. 442.

5. Brown v. De Tastet, Jac. 284, 299.

at that time any attempt to realize the assets of the firm or the amount of A's share would have been highly imprudent, and would have endangered the solvency of the firm, so that A's share in the partnership assets, if then ascertained by a forced winding up, would have been of no value whatever. Under these circumstances the profits made in the business after A's death are chiefly attributable, not to A's share of capital, but to the good-will and reputation of the business and the skill of the surviving partners, and A's legatees have no claim to participate in such profits to any greater extent than the amounts already paid or accounted for to them in respect of interest on the estimated value of A's share.[6]

4. The facts are as in the last illustration, except that the articles do not provide that the good-will shall belong to surviving partners. The deceased partner's estate is entitled to share in the profits made since his death, and attributable to good-will, in a proportion corresponding to his interest in the value of the good-will itself as a partnership asset. The evidence of experts in the particular business will be admitted, if necessary, to ascertain how much of the profits was attributable to good-will.[7]

ARTICLE 61.

EXERCISE OF OPTION TO PURCHASE OUTGOING PARTNER'S SHARE.

Where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and such option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the cause may be, is not entitled to any further or other share of profits; but if any partner, assuming to act in exercise of such option as aforesaid, does not in all material respects comply with the terms thereof, he is liable to account for subsequent profits under the last preceding Article.[8]

ILLUSTRATIONS.

1. A, B, and C are partners under articles which provide that, on the death of A, B, or C, the survivor of them may continue the business in partnership with A's representatives or nominees, taking at the same time an increased share in the profits; and that, in that case, B or C, or the survivor of them, shall enter into new articles of partnership, pay out in a specified manner the value of the part of A's interest taken over, and give security to A's representatives. B dies, then A dies. C carries on

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6. Wedderburn v. Wedderburn, 22 Beav. 84, 123, 124.

7. See 22 Beav. at pp. 104, 112, 122.

8. Vyse v. Foster, L. R. 7 H. L. at p. 329.

the business without pursuing the provisions of the articles as to entering into new articles, or paying out the value of the part of A's interest which he is entitled to acquire, or giving security. C must account to A's estate for subsequent profits.[9]

Claims against surviving or continuing Partners as Executors or Trustees.

It often happens that a partner in a firm, disposing of his interest in it by will, and not desiring the affairs of the firm to be exposed to the interference of strangers, makes his fellow-partners, or some of them, his executors or trustees, or includes one or more of them among the persons appointed to those offices. If, having done this, he dies while the partnership is subsisting, there may arise at the same time, and either wholly or in part in the same persons, two kinds of duty in respect of the testator's interest, which are in many ways alike in their nature and incidents, but must be, nevertheless, kept distinct. There is the duty of the surviving partners *as partners* towards the deceased partners's estate; and of this we have just spoken. There is also the duty of the same persons, or some of them, *as executors or trustees* towards the persons beneficially interested in that estate; and this is determined by principles which are really independent of the law of partnership.

These distinguished by further Illustrations.

The nature of these complications and the distinctions to be observed may be exhibited by some further illustrations:

a. A and B are partners. A dies, having appointed B his sole executor, and B carries on the trade with A's capital. Here B is answerable to A's estate as partner and A's executor, if he were a person other than B himself, would be the proper person to enforce that liability. B is also answerable *as executor*, to the persons beneficially interested in A's estate, for the improper employment of his testator's assets.

b. A, a trader, appoints B his executor, and dies. B enters into partnership with C and D in the same trade, and employs the testator's assets in the partnership business. B gives an indemnity to C and D, against the claim of A's residuary legatees. Here C and D are jointly liable with B to A's residuary legatees, not as partners, but as having knowingly made themselves parties to the breach of trust committed by B.[1]

Claims must be distinct, and against proper Parties in proper Capacity.

In these "mixed and difficult" cases, as Mr. Justice Lindley calls them,[2]

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9. Willett v. Blanford, 1 Ha. 253, 264.

1. Flockton v. Bunning, 8 Ch. 223, n. Per Lord Cairns, L. R. 7 H. L. 334. See, also, Stroud v. Gwyer, 28 Beav. 130.

2. ii. (3d ed.), 1036.

it is important for persons seeking to assert their right to an account of profits to make up their minds distinctly in what capacity, and on the score of what duty, they will charge the surviving partners, or any of them. If they proceed against executors as such, for what is really a partnership liability, if any, and without bringing all the members of the firm before the court, failure will be the inevitable result[3]

And must be for Profits alone, or for Interest alone.

Again, the right, where it exists, is an alternative right to interest on the capital improperly retained in the business, or to an account of the profits made by its use; and one or other of these alternatives must be distinctly chosen. A double claim for both profits and interest is inadmissible, and a mixed claim is equally so.[4]

ARTICLE 62.

RULES FOR DISTRIBUTION OF ASSETS ON FINAL SETTLEMENT OF ACCOUNTS.

In settling accounts between partners, after a dissolution of partnership, the following rules are to be observed (subject, as to the payments to partners, to any special agreement):

Losses are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually.

The assets of the firm are to be applied in the following manner and order:

1. **In paying the debts and liabilities of the firm** to persons who are not partners therein.
2. **In paying to each partner ratably what is due from the firm to him for advances** as distinguished from capital.
3. **In paying to each partner ratably what is due from the firm to him in respect of capital.**
4. **The ultimate residue, if any, is divisible among the partners** in the proportion in which profits are divisible under the partnership contract.[5]

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3. See Simpson v. Chapman, 4 D. M. G. 154; Vyse v. Foster, L. R. 7 H. L. 318; Travis v. Milne, 9 Ha. 149.

4. Per Lord Cairns, Vyse v. Foster, L. R. 7 H. L. at p. 336.

5. Almost verbally from Lindley, i. (3d ed.), 827.

PART III.

PROCEDURE AND ADMINISTRATION.

CHAPTER IX.

PROCEDURE IN ACTIONS BY AND AGAINST PARTNERS.

"In the absence of statutes changing the rule, actions must be brought by and against partners as individuals. In England and some the States of this country suits in the firm name are now authorized by statute either generally or in cases where the names of the partners are unknown."[1]

The partners must all join as plaintiffs in an action at law to enforce a partnership claim; and this whether the action is brought before or after dissolution of the partnership. No others should be joined as plaintiffs.[2]

A dormant partner, however, need not be joined as plaintiff in an action by the firm.[3]

All the partners must be joined as defendants in an action against the firm; the non-joinder of proper defendants in such an action can, however, only be raised by plea in abatement.[4]

Where two firms are composed in part of the same individuals, no action at law can be maintained by one firm against the other. In such case the remedy is in equity.[5]

Where one of the partners refuses to join in an action at law for the enforcement of a demand in favor of a partnership, he may be made a defendant in a suit in equity by the other partners.[6]

Articles 63 to 67, inclusive, relate to the new procedure in England and are not applicable to this country.

These rules [states our author], do not introduce any-

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1. See Gilm. Part. 566. Rules of Sup. Court (English) Order XVI. r. 10; 1 Lind. Part. (Ewell's ed.), 264 *et seq.*, and the American cases cited in notes.

2. Notes, 1 Lind. Part. (Ewell's ed.), *265 *et seq.*, where a large number of cases are cited.

3. Id. *265, note and cases here cited.

4. Id. *265, note.

5. Id. *267, note.

6. Id. 267, and notes

thing that amounts to the recognition of the firm as an artificial person distinct from its members. They allow the name of the firm to be used for the purpose of making procedure quicker and easier; and creditors of a firm have now the great practical convenience of being able to pursue their claims, even to judgment, without first ascertaining who all the partners are. The substantive results, however, are the same as under the former practice. Actions [at law] between a firm and one of its own members, or between two firms having a common member, which are allowed by the law of Scotland,[7] remain, it is conceived, inadmissible in England; and a judgment against a firm has precisely the same effect that a judgment against all the partners had formerly.

Remedies of Creditors.

While firm obligations are joint, judgments thereon are several in their effect and may be satisfied out of firm property or the separate property of any or all the partners.[8]

"**The creditor of a separate partner having reduced his claim to judgment, may satisfy the same out of the interest of his debtor in the partnership.** This is done in most jurisdictions [in the United States], by a levy and actual seizure of all or a part of the partnership property and a sale of the debtor partner's interest therein. This interest is the share coming to him after the firm debts have all been paid and the claims of the partners *inter se* [among themselves], have been adjusted. The purchaser at the execution sale acquires a right to have the value of such interest ascertained by an accounting and settlement of the partnership business and to have the amount turned over to him, which may be found due to the debtor partner.'"[9] Practically the purchaser of a partner's interest in the firm gets nothing

7. See Second Report of Mercantile Law Commission, p. 18, and Appendix B thereto, p. 141; Bell, Principles of Law of Scotland, § 357. See, also, the local statutes in the United States.

8. Gilm. Part. 404 *et seq.*, and cases cited in notes; Gilm. Cases Part. 281.

9. Gilm. Part. 410 *et seq.*, and cases cited; Gilm. Cases Part. 507.

more than a right to an accounting, which may be had, if not granted voluntarily, by a bill in equity.[1]

CHAPTER X.

PROCEDURE IN BANKRUPTCY AGAINST PARTNERS.

[Articles 68 to 74 inclusive are not applicable to this country.]

By the bankrupt law now in force in the United States a partnership during the continuance of the partnership business, or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt.

"The creditors of the partnership shall appoint the trustee; in other respects, so far as possible, the estate shall be administered as herein provides for other estates."

"The court of bankruptcy which has jurisdiction of one of the of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."[1]

The general rules upon the subject, the practice both before and after adjudication, the marshalling of assets and distribution thereof, etc., etc., will be found fully treated in Collier on Bankruptcy, pp. 143-178. The official forms will be found in the appendix thereto. The subject is too voluminous to be abridged in this digest.

CHAPTER XI.

ADMINISTRATION OF PARTNERSHIP ESTATES.

General Rule of Administration as to joint and separate Estate.

In the administration by the Chancery Division of the High Court of Justice of the estates of deceased partners,

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1. Gilm. Part. 410 *et seq.*, and cases cited in notes.

1. See, generally, Collier on Bankruptcy (10th ed., 1914), page 143, sec. 5.

and in the administration by the Court of Bankruptcy of the estates of bankrupt and insolvent partners, the following rules are observed:

The partnership property is applied as joint estate in payment of the debts of the firm,[1] and the separate property of each partner is applied as separate estate in payment of his separate debts.

After such payment, the surplus, if any, of the joint estate is applied in payment of the separate debts of the partners; or the surplus, if any, of the separate estate is applied in payment of the debts of the firm.[2]

ILLUSTRATIONS.[3]

1. A and B are in partnership. A dies, and his estate is administered by the court. Both A's estate and B are solvent. Here A's separate creditors and the creditors of A and B's firm may prove their debts against A's estate and be paid out of his assets *pari passu* and in the same manner. The payments thus made to creditors of the firm must then be allowed by B, in account with A's estate, as payments made on behalf of the firm, and A's estate will be credited accordingly in ascertaining what is A's share of the partnership property.[4]

2. The facts being otherwise as in the last illustration, A's estate is insolvent, and the creditors of the firm proceed to recover the full amount of their debts from the solvent partner, B. Here B will become a creditor of A's separate estate for the amount of the partnership debts paid by B beyond the proportion which he ought to have paid under the partnership contract.[5]

3. If B is also insolvent, the creditors of the firm must resort in the first instance to the partnership property, and can only come against so much of the separate property of the partners as remains after paying their separate creditors respectively; and the same rule applies if both A and B have died before the administration takes place.[6]

4. A and B are partners. A dies, and B afterwards becomes bankrupt. M, a creditor of the firm, proves his debt in B's bankruptcy, and receives some dividends which satisfy it only in part. A's estate is administered

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1. That is, to persons other than partners; see Art. 78.

2. The rules above stated are well settled in this country. See Gilm. Part. 423, 458, and notes; 1 Lind. Part. (Ewell's ed.), *352 *et seq.*, and notes; 2 id. *598 *et seq.*, and notes. As to the rules in bankruptcy, see id. pp. 429, 449, 453, and notes.

3. See authorities cited in note next, *supra*.

4. Ridgeway v. Clare, 19 Beav. at p. 116.

5. Ib.

6. Ib. at pp. 116, 117.

by the court, and M proves in that administration for the residue of his debt. Separate creditors of A also prove their debts. M has no claim upon A's estate until all the separate creditors of A have been paid.[7]

5. A and B are partners under articles which provide that, in the event of A's death during the partnership, B's interest in the profits shall thenceforth belong to A's representatives, B receiving a sum equivalent to his share of profits for six months, to be ascertained as therein provided, and the amount of his capital. A dies, having appointed B his executor. B carries on the business for some time, and then becomes a liquidating debtor. The partnership property existing at the date of A's death is not converted into A's separate property by the provisions of the partnership articles, and such property, so far as it is still found in B's hands at the time of liquidation, is applicable in the first instance as joint estate to pay the creditors of the firm.[8]

Dicta laying down the Rule.

This rule has been repeatedly laid down in its general form as a well-established one.

"Upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it." [9]

"The joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other;" and this applies to the administration of estates in equity as well as in bankruptcy.[1]

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7. Lodge v. Prichard, 1 D. J. S. 610.

8. *Ex parte* Morley, 8 Ch. 1026.

9. Rolfe v. Flower, L. R. 1 P. C. at p. 48; *Ex parte* Dear, 1 Ch. D. 519, per James, L. J. *Ex parte* Morley, 8 Ch. 1032.

1. Lodge v. Prichard, 1 D. J. S. at pp. 613, 614, per Turner, L. J. The Supreme Court of Judicature Act, 1875, s. 10, assimilates the rules of administration of deceased persons' estates to those "in force for the time being under the Law of Bankruptcy with respect to the estate of persons adjudged bankrupt;" apart from this enactment, however, the practice was already so settled on the point now in question.

STEPHEN ON PLEADING.

STEPHEN ON PLEADING.

THE PRINCIPLES OF PLEADING,

ETC., ETC., ETC.

STEPHEN ON PLEADING.

In the course of administering justice between litigating parties, there are two successive objects,— to ascertain the subjects for decision, and to decide. [1] [The first object is accomplished by what is termed **pleading,**[1] which **is " the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defence;** it is the formal mode of alleging on the record that which would be the support or the defence of the party in evidence."]

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1. " *Plee* in French, in English *plea*, were anciently used to signify *suit* or *action*. While used in this sense they gave rise respectively to the words *pleder*, and to *plead*, of which the primary meaning was, accordingly, to *litigate*, but which, in the later English law, have been taken in the more limited sense of *making allegation in a case*. Hence the name of that science of *pleading*, to which this work relates.

This variable word, to *plead*, has indeed still another and more popular use, importing the forensic *argument* in a cause; but it is not so employed by the profession.

Whether *plee* and *pleder* were *derived* from the parallel Latin terms *placitum* and *placitare* is somewhat doubtful."

" The method provided by law for enforcing a right or redressing a wrong is termed an action. This but paraphrases the language of Coke who, following earlier writers, defined an action as the legal demand of one's right." Citing Co. Litt., 285, a. And see 3 Black. Com. 116, 117; Bradlaugh v. Clark, 8 App. Cas. 361; Webster v. County Com'rs, 63 Me. 27; Valentine v. Boston, 20 Pick. 201; Badger v. Gilmore, 37 N. H. 457; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; Missionary Society, etc., v. Ely, 56 Ohio St. 405; Appeal of McBride, 72 Pa. 280.

" The word 'Suit' was formerly used to designate a proceeding in equity as distinguished from a litigation in a court of law which was termed an action; but generally at

CHAPTER I.

OF THE PROCEEDINGS IN AN ACTION, FROM ITS COMMENCEMENT TO ITS TERMINATION.

Actions[2] are divided into real, personal, and mixed. [3]

Real actions are those brought for specific recovery of lands, tenements, or hereditaments.[3]

Personal actions are those brought for specific recovery of goods and chattels, or for damages, or other redress, for breach of contract, or other injuries, of whatever description, the specific recovery of lands, tenements, and hereditaments only excepted.

Mixed actions[4] are such as appertain in some degree to both the former classes, being brought both for specific recovery of lands, tenements, or hereditaments, and for damages for injury sustained in respect of such property.

There are three superior courts of the common law, the King's Bench, the Common Pleas, and the Exchequer.[5] [4] **The original distribution of business among them,** upon their first establishment, was as follows: The cognizance of crime, and of such matters of litigation in general as

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this day the terms are used interchangeably." Wills' Gould's Plead., 1, 2.

The second London edition of Stephen on Pleading forms the basis of this abridgment.

On the general subject of common law pleading and practice the student is referred to Chitty on Pleading, 3 vols. (an early edition preferably); Stephen's Nisi Prius, 3 vols.; Archibald's Nisi Prius; Selwyn's Nisi Prius; Wentworth's Pleading (10 vols.); Burrill's Practice, 3 vols.; Green's New Practice, 2 vols.; Puterbergh's Common Law Pleading & Practice. These are on common law pleading and practice, which must be understood by every one who would be proficient in modern pleading and practice.

2. An action is a proceeding in a court of law for the redress of a wrong. See Wills' Gould on Pleading, 1 and note.

3. Real actions, as at common law, are obsolete. See Wills' Gould on Pleading, ch. 2; Id., p. 9 and notes.

4. See Wills' Gould's Plead., ch. 3.

5. The Supreme Court of Judicature Act (1875) has made many radical changes in the constitution of the English courts. See the subject more fully considered in vol. 1 (Blackstone's Commentaries), title Courts. See 36 & 37 Vict., ch. 66; 38 & 39 id., ch. 77; 39 & 40 id., ch. 59; 40 id., ch. 9; 44 & 45 id., ch. 68.

directly concerned the Crown (those relating to the revenue excepted), was exclusively appropriate to the Court of King's Bench; civil suits between subject and subject (called *communia placita*),[6] to the Common Pleas; and matters relating to the royal revenue, to the Exchequer. **In course of time, considerable violations of this arrangement** took place, usurpation on the province of the Common Pleas being made by each of the other courts. **Of these changes, the general result is as follows: The King's Bench** has now jurisdiction not only in those matters which belonged to it by its original constitution, but in *all personal actions whatever*. The case is the same with the **Exchequer;** but both these courts are still excluded from the cognizance of actions *real* and *mixed*. **The Common Pleas** retains its original province, and therefore entertains all actions whatever between subject and subject, whether of the real, mixed, or personal class. [5]

An action is commenced in the King's Bench or Common Pleas either by original writ or by bill; in the Exchequer, by bill only.[7] Of these methods of proceeding, the former is the regular and ancient one, and the latter is in the nature of an exception to it.

An original writ (*breve originale*) **is a mandatory letter issuing out of the Court of Chancery,** under the great seal and in the king's name, directed to the sheriff of the county where the injury is alleged to have been committed, containing a summary statement of the cause of complaint, and requiring him, in most cases, to command the defendant[8] to satisfy the claim; and on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance. In

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6. Common pleas.

7. In this country actions are begun in a variety of ways of which that by summons is the most common. Writs of *capias*, attachment, replevin, etc., are also authorized by statute in certain cases. Consult the local statutes and works on practice.

8. In a *personal* action the parties are called *plaintiff* and *defendant;* in a *real* action, more properly *demandant* and *tenant*. The former terms, however, are applicable in actions of every description, and are those commonly employed when a suit is mentioned generally, without reference to its particular nature.

some cases, however, it omits the former alternative, and requires the sheriff simply to enforce the appearance. [6] One **object of the original writ**, therefore, is to *compel the appearance* of the defendant in court; it is also necessary as *authority for the institution of the suit.*[9]

The original writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms. The most ancient writs had provided for the most obvious kinds of wrong; but in the progress of society, cases of injury arose, new in their circumstances, so as not to be reached by any of the writs then known in practice; and it seems that either the clerks of the chancery (whose duty it was to prepare the original writ for the suitor) had no authority to devise new forms to meet the exigency of such new cases, or their authority was doubtful, or they were remiss in its exercise. [7] Therefore by the **Statute Westminster 2, 13 Edward I., chapter 24**, it was provided, "That as often as it shall happen in the chancery that in one case a writ is found, and in a *like case* (**in consimili casu**), falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the next parliament," &c. This statute, while it gives to the officers of the chancery the power of framing new writs *in consimili casu* with those that formerly existed, and enjoins the exercise of that power, does not give or recognize any right to frame such instruments for cases *entirely new.* It seems, therefore, that for any case of that description no writ can be lawfully issued, except by authority of parliament. But on the other hand, new writs were copiously produced, according to the principle sanctioned by this act, *i. e., in consimili casu,* or upon the analogy of actions previously existing; and other writs also being added from time to time by express authority of the legislature, large

9. Original writs in the sense of our author are not in use in this country.

accessions were thus made to the ancient stock of *brevia originalia*. [8].

All forms of writs once issued were entered from time to time and preserved, in the Court of Chancery, in a book called the **Register of Writs**, which book is still in authority.

An original writ is essential to the due institution of the suit.[1] These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are considered as within the scope of judicial remedy, in the English law, but those to which the language of some known writ is found to apply, or for which some new writ, framed on the analogy of those already existing, may, under the provision of the Statute of Westminster 2, be lawfully devised. [9] The enumeration of writs and that of actions have become in this manner identical.

The real and mixed actions which, in modern times, have perhaps come most frequently into use are those of a writ of right, formedon, dower, and quare impedit [all obsolete].

The writ of right[2] **is the remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee simple; founding his title on the right of property, or mere right, arising either from his own seisin, or the seisin of his ancestor or predecessor. [10]**

The writ of formedon lies where a party claims the specific recovery of

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1. See, however, the Supreme Court of Judicature Acts, already cited. Writs by which civil action are now commenced are not original writs in the sense of the text. The term is, however, loosely used to designate the writs or process issuing out of and returnable to the same court in which the action is brought. See Wills' Gould's Plead., pp. 67, 68, notes; Pussey v. Snow, 81 Me. 288.

2. The form of a writ of right is as follows:

"*George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, and so forth, to the sheriff of* ——— *greeting:*

Command *C. D.*, that justly and without delay he render unto *A. B.* four messuages, four gardens and four acres of land, with the appurtenances, in the parish of ———, in the county of ———, which he claims to be his right and inheritance, and whereof he complains that the aforesaid *C. D.* unjustly deforces him. And unless he shall do so, and if the said *A. B.* shall give you security of prosecuting his claim, then summon, by good summoners, the said *C. D.*, that he be before our justices at Westminster, in eight days of Saint Hilary, to show wherefore he hath not done it; and have you there the summoners and this writ.

Witness ourself at Westminster, on the —— day of ———, in the —— years of our reign,"

lands and tenements as issue in tail, or as remainderman or reversioner upon the determination of an estate tail. [11]

The writ of dower [*unde nihil habet*] [3] lies for a widow claiming the specific recovery of her dower, no part of it having been yet assigned to her.

The writ of quare impedit is the remedy by which, where the right of a party to a benefice is obstructed, he recovers the presentation, and is the form of action now constantly adopted to try a disputed title to an advowson. [12]

Of **personal actions**, the most common are the following: **[Account],**[4] **debt, covenant, detinue, trespass, trespass on the case, and replevin.** [13]

The writ of debt lies where a party claims the recovery of a debt, i. e., a liquidated or certain sum of money alleged to be due to him.[5]

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3. Under which she has nothing.

4. The action of account is still in use in Illinois, Indiana and perhaps other states to compel an accounting, where no formal settlement of accounts has been had. See Wills' Gould's Plead., ch. 8; Kemp v. Merrill, 92 Ill. App. 46; Field v. Brown, 146 Ind. 293; 1 Stephens' Nisi Prius, *1-5.

"By statute in Illinois the action has been enlarged so that it will lie on book accounts, and it may be brought by one tenant against another. Citing Garrity v. Hamburger Co., 136 Ill. 499; Barnum v. Landon, 25 Conn. 137.

At common law the action could not be maintained between partners where there were more than two partners, but statutes allow the action among three or more partners.

One item unadjusted will defeat a plea of full accounting.

The issue in this action is not whether upon a final settlement the account is balanced, but whether there shall be an accounting.

The judgment, if found for the plaintiff, is *quod computet* — that the defendant ought to account. The adjusting of the balance is left to auditors. This judgment is interlocutory and determines nothing beyond the liability to account." Wills' Gould's Plead., 30 and notes.

5. The form of the writ of debt is as follows:

"*George the Fourth, &c., to the sheriff of* ——— *greeting:*

Command *C. D.*, late of ———, gentleman, that justly and without delay he render to *A. B.* the sum of —— pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it is said. And unless he shall do so, and if the said *A. B.* shall make you secure of prosecuting his claim, then summon, by good summoners, the said *C. D.*, that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, (*h*,) to show wherefore he hath not done it; and have you there the names of the summoners and this writ.

Witness ourself at Westminster, the —— day of ———, in the —— year of our reign."

The writ of covenant lies where a party claims damages for breach of covenant, *i. e.*, of a *promise under seal.*[6] [14]

The writ of detinue lies where a party claims the specific recovery of goods and chattels or deed and writings detained from him[7] [superseded by replevin].

The writ of trespass lies where a party claims damages for a trespass committed against him. [15] **A trespass is an injury committed with violence,** and this violence may be either *actual* or *implied;* and **the law will imply violence, though none is actually used, where the injury is of a direct and immediate kind, and committed on the person or tangible and corporeal property of the plaintiff.** Of *actual* violence, an assault and battery is an instance; of *implied,* a peaceable but wrongful entry upon the plaintiff's land.[8]

The writ of trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply.[9] [17] This action originates in the power given by **the Statute of Westminster** 2 to the clerks of the chancery to frame new writs **in consimili casu** with writs already known. Under this power they constructed many writs for different injuries, which were considered as *in consimili casu* with, that is, to

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This is debt *in the debet*, which is the principal and only common form. There is another species mentioned in the books, called debt *in the detinet*, which lies for the specific recovery of *goods*, under a contract to deliver them. 1 Chitty, 101, 1st Ed.

"Before us, wheresoever we shall then be in England," expresses in writs the court of king's bench, where the action in this and the following examples is supposed to be brought.

See, generally, Wills' Gould's Plead., ch. 6.

6. See Wills' Gould's Plead., ch. 7.

7. See Wills' Gould's Plead., ch. 9.

8. See Wills' Gould's Plead., ch. 11; Leame v. Bray, 6 East. 602; Scott v. Shepherd, 2 Blackstone Rep. 892; 1 Smith's Lead. Cas. *549. In some of the states as in Maine, Michigan, Illinois and perhaps others, the distinction between trespass and case has been abolished by statute. See Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), ch. 22; Wills' Gould's Plead., ch. 11. This, however, does not affect the substantial rights of the parties, but only the remedy. Blaloch v. Randall, 76 Ill. 228.

9. It is not easy to give a short and sufficiently comprehensive description of the scope of this action. That which is here attempted is perhaps new, and is believed to be accurate. A definition somewhat similar is given in 3 Woodd. 167. See note, *supra;* Wills' Gould's Plead., ch. 12 and notes.

bear a certain analogy to, a *trespass.* The new writs invented for the cases supposed to bear such analogy have received, accordingly, the application of writs of *trespass on* (*the case brevia de transgressione super casum*),— as being **founded upon the particular circumstances of the case** thus requiring a remedy, and to distinguish them from the old writ of *trespass,* and the injuries themselves, which are the subject of such writs, are not called *trespasses,* but have the general names of **torts,** *wrongs,* or *grievances.* The writs of trespass on the case, though invented thus *pro re nata,* in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting collectively a new individual *form of action;* and this new genus took its place, by the name of **trespass on the case,** among the more ancient actions of debt, covenant, trespass, &c. Such being the nature of this action, **it comprises,** of course, **many different species.** [18] There are two, however, of more frequent use, perhaps, than any other form of action whatever. These are, *assumpsit* and *trover.*

The action of assumpsit lies where a party claims damages for breach of simple contract,[1] *i. e., a promise not under*

1. This is also called "trespass on the case upon promises." See, generally, Wills' Gould's Plead., ch. 13 and notes.

The following is the form of a writ of trespass on the case.

"IN TROVER.

George the Fourth, &c., to the sheriff of ——— greeting:

If *A. B.* shall make you secure of prosecuting his claim, then put by gages and safe pledges *C. D.*, late of ———, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that, whereas the said *A. B.* heretofore, to wit, on the —— day of ———, in the year of our Lord ———, at ———, in the county of ———, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables and twenty chairs of great value, to wit, of the value of —— pounds, of lawful money of Great Britain; and being so possessed thereof, he, the said *A. B.*, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, came to the possession of the said *C. D.* by finding; yet the said *C. D.*, well knowing the said goods and chattels to be the property of the said *A. B.*, and of right to belong and appertain to him, but contriving and

seal. Such promises may be *express* or *implied;* and the law always *implies* a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application.

The action of trover is that usually adopted (by preference to that of *detinue*) **to try a disputed question of property in goods and chattels. In form, it claims damages,** and is founded on a suggestion in the writ (which in general is a mere **fiction), that the defendant found the goods** in question, being the property of the plaintiff, and proceeds to allege that he **converted** them to his own use.[2]

In the action of replevin there is no original writ, this action not being commenced in the superior courts. [22] It is, however, *entertained* there, by virtue of an authority which the superior courts exercise, of *removing* suits, in certain cases, from an inferior jurisdiction to their own cognizance. **Where goods have been distrained, a party making plaint to the sheriff may have them replevied,** that is, redelivered to him, upon giving security to prosecute an action against the distrainer, for the purpose of trying the legality of the distress; and if the right be determined in favor of the latter, to return the goods. The action so prosecuted is called an action of *replevin,* and is commenced in the county court. From thence it is removed into one of the superior courts by a writ either of *recordari facias loquelam,* or *accedas ad curiam.* **In form, it is an action for damages for the illegal taking and detaining of the goods and chattels.** It is held that an action of replevin may be brought upon other kinds of illegal taking, besides

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fraudulently intending, craftily and subtilly, to deceive and defraud the said *A. B.* in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the said *A. B.* (although often requested so to do); but so to do hath hitherto wholly refused, and still refuses; and afterwards, to wit, on the ——— day of ———, in the year ——, at ——— aforesaid, in the county aforesaid, converted and disposed of the said goods and chattels to his, the said *C. D.'s,* own use, to the damage of the said *A. B.* of ——— pounds, as it is said; and have you there the names of the pledges and this writ.

Witness ourself at Westminster, the —— day of ———, in the —— year of our reign."

2. See note, *supra;* also Wills' Gould's Plead., ch. 14.

that by way of a distress, but in no other case is the proceeding now known in practice.[3]

The history of the action of ejectment as a remedy for recovery of land is as follows: **At a very early period,** that is, soon after the reign of Edward III., **real and mixed actions began gradually to fall into neglect,** in consequence of their being more dilatory and intricate in their forms of proceeding than personal actions, and of their being cognizable only in the Court of Common Pleas. [23] **In lieu of them, recourse was had to certain personal actions,** which, though they did not *claim* the specific recovery of land (like those of the real and mixed classes), were yet attended with incidents that indirectly produced that benefit. **Of these the principal, and that which is alone retained in modern practice, was the action of ejectment** (*ejectio firmae*), **a species of the personal action of trespass, in which damages were claimed by a tenant for a term of years, complaining of forcible ejection or ouster from the land demised.** In favor of this mode of remedy, **the courts determined that the plaintiff was entitled not only to recover the damages** claimed by the action, **but should also,** by way of additional relief, **recover possession of the land itself** for the term of years of which he had been ousted. [24]

Regularly, none could resort to this form of suit but those who had sustained ouster from a term of years, such being the shape of the complaint; but it was rendered much more extensive in its application by the **invention of a fictitious system of proceeding,** which enabled claimants of land, in almost every instance, upon whatever title they relied (whether term of years or freehold), to bring their cases ostensibly within the scope of this remedy. This fictitious method, being favored and protected by the courts, passed

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3. With us it has superseded the action of detinue, and by statute usually lies for the recovery of goods unlawfully taken or detained.

The action of replevin above mentioned is that by *plaint*, which is the only kind known in practice. There was anciently in use another species of replevin, in which a writ issued out of the court of chancery, directed to the sheriff. For the learning on this subject, consult F. N. B., 69, 70; Doct. Pl., 313, 314; 2 Inst., 139; Dalt. Sh., 273; Moor v. Watts, Ld. Ray., 617; 2 Selwyn, 1053; Wills' Gould's Plead., ch. 10 and notes.

into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property.[4]

Supposing an original writ to be duly issued and executed on the defendant, it is next to be returned. [25]

By the terms of an original writ, the sheriff is commanded to have the writ itself in court on a certain day, viz., the day on which the defendant is directed to appear there. On that day the writ is said to be **returnable,** and it is called the **return day** of the writ. **On the return day it is the duty of the sheriff to remit the writ into the superior court of common law, with his return;** that is, a short account in writing of the manner in which he has executed it.[5] [26]

If the defendant does not appear in obedience to the original writ, there issue, when the time for appearance is past, other writs, called **writs of process,** enforcing the appearance of the defendant, either by attachment, or distress of his property, or arrest of his person, according to the nature of the case. **These differ from the original writ in the following principal particulars:** They **issue not out of chancery,** but out of the court of common law into which the original is returnable, and accordingly are not under the great seal, but the private seal of the court; and **they bear teste** (that is, conclude with an attesting clause) **in the name of the chief justice** of that court, and not in the name of the king himself. In common with all other writs issuing from the court of common law during the progress of the suit, they are described as **judicial writs,** by way of distinction from the *original* one obtained from the chancery.[6]

There is one of these writs of process which will require some specific notice. It is called a **capias ad respondendum, and directs the sheriff to enforce the appearance of the defendant by arrest of his person.** It lies in all the most usual

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4. See the whole course of proceeding in an ejectment, perspicuously stated, in 3 Bl. Com. 199, vol. 1 of this series. See, also, Wills' Gould's Plead., ch. 5.

5. This return is a part of the record.

6. In this country, actions are not commenced by original writ, but usually by process issued from and returnable to the court which tries the action.

personal actions. [27] The *capias* being only process, is of course regularly issuable only after an original writ has been first sued out and returned; but to save time and expense, it has become **the general practice,** in all cases where it lies, **to resort to it in the first instance,** and to suspend the issuing of the original writ, or even to neglect it altogether, unless its omission should afterwards be objected by the defendant.

In all real and mixed actions, and also in personal ones when the capias does not lie, the original writ must be regularly made out and issued. [29] And even when the action actually commences with a *capias,* in the manner above described, the existence and issuing of an original is still, in point of law, always *supposed;* that instrument being, in principle, required, both as authority for the institution of the suit itself, and for the issuing of the process.

Under the capias or other process, the defendant is compelled to appear, either by force of *actual arrest* (where the law authorizes that proceeding), or by other methods of practice which may be here passed over as belonging to the law of process.[7] [30] This **appearance** shall now be supposed to take place. At the same time the plaintiff also *appears,* and the *pleadings* commence. The next subject for consideration, therefore, shall be **the manner in which the parties appear and plead.**

It will be necessary here to give a short account of **the method of appearance and pleading anciently in use.**

As now, so formerly, the defendant was made to appear by original writs and process founded upon them. These, as now, were returnable in *term time;* and as these writs were returnable always in *term,* so **the appearance of the parties, the pleading, and all proceedings whatever in open court took place in term time only,** and never in vacation.

The appearance of the parties might be either in person or by attorney: but *actual and personal* appearance in *open court,* either by the attorney or his principal, was requisite.

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7. Full information on this subject, with respect to personal actions, will be found in 1 Tidd, 105-142, etc., 8th ed.; 1 Seldon, 64-102. See, also, local statutes and works on practice. See, also, vol. 1 of this series.

Upon such appearance followed the allegations of fact, mutually made on either side, by which the court received information of the nature of the controversy. These, described at first by the rude term of *loquela,* have been in more modern times denominated the *pleading,* or **pleadings.** [31]

As the appearance was an actual one, so **the pleading was an oral altercation in open court,** in *presence of the judges.* These oral pleadings were delivered either by the party himself or his *pleader,* called *narrator* and *advocatus.*

It was the office of the judges to superintend the oral contention thus conducted before them, and their general aim was to compel the pleaders so to manage their alternate allegations as at length to arrive at **some specific point or matter affirmed on the one side and denied on the other.** [32] When this matter was attained, if it proved to be **a point of law,** it **fell to the decision of the judges** themselves; but if **a point of fact,** the parties then, by mutual agreement, referred it **to one of the various methods of trial** then practised, or to such trial as the court should think proper. **This result being attained, the parties were said to be at issue** (*ad exitum,*— that is, at the *end* of their pleading); the question so set apart for decision was itself called **the issue,** and was designated, according to its nature, either as an issue **in fact** or an issue **in law.** The whole proceeding then closed, in case of an issue in *fact,* by an award or order of the court directing the institution, at a given time, of the mode of trial fixed upon; or in case of an issue in *law,* by an adjournment of the parties to a given day, when the judges should be prepared to pronounce their decision.

During this oral altercation a contemporaneous official minute, in writing, was drawn up by one of the officers of the court on a parchment roll, containing a transcript of all the different allegations of fact to the issue, inclusive. It comprised, also, a short notice of the nature of the action, the time of the appearance of the parties in court, and the acts of the court itself during the progress of the pleading consisting chiefly of the "**continuances**" of the proceed-

ings.[8] [33] **The official minute of the pleading and other proceedings thus made on the parchment roll was called the record.** As the suit proceeded, similar entries of the remaining incidents in the cause were from time to time continually made upon it; **and when complete, it was preserved as a perpetual, intrinsic, and exclusively admissible testimony of all the judicial transactions which it comprised.**[9] [34]

To return to the modern practice.

The appearance of the parties is no longer (as formerly) **by the actual presence in court either of themselves or their attorneys.** An appearance of this kind is, however, still *supposed,* and exists in fiction or contemplation of law. But in fact, **appearance is effected on the part of the defendant (where he is not arrested) by making certain formal entries** in the proper office of the court, expressing his appearance; **or in case of arrest, it may be considered as effected by giving bail to the action.** [35] **On the part of the plaintiff, no formality expressive of appearance is observed;**[1] but

8. Their nature was as follows: There were certain purposes for which the law allowed the proceedings to be adjourned, or continued over, from one term to another, or from one day to another in the same term; and, when this happened, an entry of such adjournment to a given day, and of its cause, was made on the parchment roll; and by that entry the parties were also appointed to reappear at the given day in court. Such adjournment was called a *continuance.* Thus the award of the mode of trial on an issue in fact, and also the adjournment of the parties to a certain day to hear the decision of the court on an issue in law, were each of them *continuances,* and were entered as such on the roll. And if any interval or interruption took place without such an adjournment duly obtained and entered, the chasm thus occasioned in the progress of the suit was called a *discontinuance,* and the cause was considered as *out of court* by the interruption, and was not allowed afterwards to proceed. These entries are now by statute no longer necessary.

9. Lord Coke defines a record as a "memorial or remembrance in rolls of parchment of the proceedings or acts of a court of justice," etc., and observes that "the rolls being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity, as they admit no averment, plea, or proof to the contrary." Co. Litt., 260, a. See vol. 1, Pleading.

1. In Illinois and some other states it is the practice that the attorney for the plaintiff shall file with the clerk of the court a præcipe or order, for the issuance of process, which

upon appearance of the defendant, effected in the manner above described, both parties are considered as *in court*.

The appearance of either party may in general purport to be either in his own person or that of his attorney; but when he appears by attorney, there ought regularly, and there is always supposed to be, a **warrant in writing** executed by him for that purpose.[2]

On appearance of the parties, the pleadings commence.

These have long since ceased to be delivered *orally* or *in open court*. **The present practice is to draw them up in the first instance on paper**, and the attorneys of the opposite parties either mutually deliver them to each other out of court, or (according to the course of practice in the particular case) file them in the office of the proper officer of the court, from whence a copy of each peading is furnished to the party by whom it is to be answered. [36] **These paper pleadings, at a subsequent period, are entered on record** by transcribing them on a parchment roll. The paper pleadings thus filed or delivered between the parties, pursue the style in which the record itself was drawn up. [37] Like it, they are expressed in the third person: "*A B* complains;" "*C D* comes and defends," &c., and state the form of action, the appearance of the parties, and sometimes the continuances and other acts and proceedings in court. They are framed, in short, as if they were *extracts from the record,* though the record is by the present practice not drawn up till a subsequent period, and is then a transcript from *them*.[3]

As the oral pleading could formerly be delivered by none but regular advocates, so **at the present day it is necessary that each paper pleading should be signed by a barrister** (some few of the most ordinary and simple kind, and all declarations excepted), and in the Common Pleas no bar-

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specifies the court, names the parties, the name of the action, the name of the writ, return day and amount of the debt or damages. See Milwaukee Ins. Co. v. Schallman, 188 Ill. 220; Wills' Gould's Plead., p. 70, note.

2. An excellent practice; but rarely followed in this country.

3. In this country the pleadings on file constitute parts of the record without enrollment.

rister can sign a pleading but one who has attained the degree of serjeant [otherwise now]; but in the other courts there is no such restriction.[4] [38]

The pleading begins with the declaration or count, which is a statement on the part of the plaintiff of his cause of action. [39] In the declaration, the plaintiff states the nature and quality of his case in general more fully than in the writ, but still in strict conformity with the tenor of that instrument; any substantial variancce between them being a ground of objection.[5]

In ejectment, though the proceeding is nominally by original or by bill, as in other actions, **no original or writ of process is, in fact, ever used.** [48] **The whole method of proceeding is anomalous, and depends on fictions** invented and upheld by the courts for the convenience of justice. **An ejectment commences by delivering to the tenant in possession of the premises a declaration framed as against a fictitious defendant** (for example, Richard Roe) at the suit of a fictitious plaintiff (for example, John Doe). This declaration, when the action is brought as by original, is framed as if it had been preceded by original writ against Richard Roe, but is, in fact, the first step in the cause. **Subscribed to this declaration is a notice in the form of a letter from the fictitious defendant to the tenant in possession,** apprising the latter of the nature and object of the proceeding, and advising him to appear in court in the next term to defend his possession. [49] Accordingly, in the next term **the tenant in possession obtains a rule of court, allowing him to be made defendant instead of Richard Roe, upon certain terms** prescribed by the court for the convenient trial of the title, among others, his appearing and receiving, without writ or process, a new declaration, like the first, but with his own name inserted as defendant, and pleading thereto.[6]

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4. In this country, there being no barristers, the declaration is signed by the attorney.

5. For forms of declarations, pleas, etc., in the different actions, the student is referred to the second and third volumes of Chitty on Pleading. These forms should be diligently studied.

6. In this country this fiction has been abolished.

[With respect to proceeding by bill in personal actions in lieu of original writ, as the subject is now of no practical importance either in this country or in England, and is omitted from the last English edition of our Author, it is not thought worth while to consume so much space as would be necessary to consider the subject in this Abridgment. For particulars, the student is referred to Professor Tyler's edition of Stephen on Pleading, p. 75 *et seq.*, and to 3 Blackst. Comm. 285.]

The plaintiff having declared[7] (*i. e.*, filed or delivered his declaration), **it is for the defendant to concert the manner of his defence.** [64] For this purpose, he considers whether,

7. The following forms of declaration will serve to illustrate the text:

"DECLARATION IN DEBT, ON A BOND.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

———, to wit, *C. D.* was summoned to answer *A. B.* of a plea, that he render to the said *A. B.* the sum of —— pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him. And thereupon the said *A. B.*, by ———, his attorney, complains: For that whereas the said *C. D.* heretofore, to wit, on the —— day of ———, in the year of our Lord ——, at ———, in the county of ———, by his certain writing obligatory, sealed with his seal and now shown to the court here (the date whereof is the day and year aforesaid), acknowledged himself to be held and firmly bound to the said *A. B.* in the sum of —— pounds, above demanded, to be paid to the said *A. B.* Yet the said *C. D.* (although often requested) hath not as yet paid the said sum of —— pounds above demanded, or any part thereof, to the said *A. B.*; but so to do hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of —— pounds; and therefore he brought his suit, &c."

"DECLARATION IN TRESPASS.

Quare clausum fregit.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

———, to wit, *C. D.* was attached to answer *A. B.* of a plea, wherefore he, the said *C. D.*, with force and arms broke and entered the close of the said *A. B.*, situate and being in the parish of ———, in the county of ———, and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage of the said *A. B.* there growing, and being of great value, and other wrongs to the said *A. B.* there did, to the damage of said *A. B.* and against the peace of our lord the now king. And thereupon, the said *A. B.*, by ———, his attorney, complains: For that the said *C. D.* heretofore, to wit, on the —— day of ———, in the year of our Lord ——, with force and arms, broke and entered the close of the said *A. B.*, that is to say, a certain close called ———, situate and being in the parish aforesaid, in the county aforesaid, and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage of the said *A. B.* then and there growing, and being of great value, to wit, of the value of ——

on the face of the declaration, and supposing the facts to be true, the plaintiff appears to be entitled, in point of *law*, to the redress he seeks, and in the form of action which he has chosen. If he appears to be not so entitled in point of law, and this by defect either in the *substance* or the *form* of the declaration, *i. e.*, as disclosing a case insufficient on the merits or as framed in violation of any of the rules of pleading, the defendant is entitled to except to the declaration on such ground. [65] In so doing he is said to *demur;* and this kind of objection is called a *demurrer*.

A demurrer (from the Latin *demorari,* or French *demorrer,* to "wait," or "stay") **imports that the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side,** but will wait the judgment of the court whether he is bound to answer.[8]

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pounds of lawful money of Great Britain, and other wrongs to the said *A. B.* then and there did, against the peace of our said lord the king, and to the damage of the said *A. B.* of —— pounds; and therefore he brings his suit, &c."

"DECLARATION IN TRESPASS ON THE CASE.

In assumpsit—for goods sold and delivered.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

———, to wit, *C. D.* was attached to answer to *A. B.* of a plea of trespass on the case; and thereupon the said *A. B.*, by ———, his attorney, complains: For that whereas the said *C. D.* heretofore, to wit, on the —— day of ———, in the year of our Lord ——, at ———, in the county of ———, was indebted to the said *A. B.* in the sum of —— pounds, of lawful money of Great Britain, for divers goods, wares, and merchandises, by the said *A. B.* before that time sold and delivered to the said *C. D.*, at his special instance and request; and, being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfuly promised the said *A. B.* to pay him the said sum of money when he, the said *C. D.*, should be thereto afterwards requested. Yet the said *C. D.*, not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *A. B.* in this behalf, hath not yet paid the said sum of money, or any part thereof, to the said *A. B.* (although oftentimes afterwards requested); but the said *C. P.*, to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of —— pounds; and therefore he brings his suit, &c."

8. The form of a demurrer to a

If the defendant does not demur, his only alternative method of defence is to oppose or answer the declaration by matter of fact. In so doing, he is said to plead (by way of distinction from *demurring*), and the answer of fact so made is called the **plea.** [67]

Pleas are divided into pleas dilatory[9] **and peremptory.**

Subordinate to this is another division. Pleas are either **to the jurisdiction of the court, in suspension of the action, in abatement of the writ, or in bar of the action:** the three first of which belong to the *dilatory* class; the last is of the *peremptory* kind.

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declaration will appear by the following examples:

"DEMURRER TO THE DECLARATION.

For matter of substance.

[In debt.]

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

C. D. ats A. B. } And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c.; and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said *A. B.* to have or maintain his aforesaid action against him, the said *C. D.;* and that he, the said *C. D.*, is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said *C. D.* prays judgment, and that the said *A. B.* may be barred from having or maintaining his aforesaid action against him, &c."

"DEMURRER TO THE DECLARATION.

For matter of form.

[In debt.]

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

C. D. ats A. B. } And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c.; and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said *A. B.* to have or maintain his aforesaid action against the said *C. D.;* and that he, the said *C. D.*, is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said *C. D.* prays judgment, and that the said *A. B.* may be barred from having or maintaining his aforesaid action against him, &c. And the said *C. D.*, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said declaration; that is to say, that no day or time is alleged in the said declaration at which the said causes of action, or any of them, are supposed to have accrued. And also that the said declaration is in other respects uncertain, informal, and insufficient." See Wills' Gould's Plead., 100, 570.

9. See Wills' Gould's Plead., 405, 409, 411.

A plea to the jurisdiction is one by which the defendant excepts to the jurisdiction of the court to entertain the action.[1]

A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed. [68] The number of these pleas is small. Among them is that which is founded on the nonage of one of the parties, and it termed *parol demurrer*.

A plea in abatement of the writ is one which shows some ground for abating or quashing the original writ, and makes prayer to that effect. [69]

The grounds for so abating the writ are any matters of fact tending to impeach the correctness of that instrument; *i. e.*, to show that it is improperly framed or sued out, without, at the same time, tending to deny the right of action itself.

Pleas in abatement relate either to the person of the plaintiff, to the person of the defendant, to the count or declaration, or to the writ. [70]

A plea in abatement to the person of the plaintiff or defendant is such as shows some personal disability in one of these parties to sue or be sued, as that the plaintiff is

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1. "PLEA TO THE JURISDICTION.

In an action of ejectment for lands situate within a county palatinate. ate.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

C. D. ats *A. B.* } And the said *C. D.*, in his proper person, comes and defends the force and injury, and says that the said county of Chester is, and, from time whereof the memory of man is not to the contrary, hath been a county palatine; and there now are and for all time aforesaid have been justices there; and that all and singular pleas for the recovery of manors, messuages, and tenements, lying and being within the said county of Chester, before the justices there for the time being, and not here in the court of our lord the king, before the king himself. And this he is ready to verify. Wherefore, since the plea aforesaid is brought for recovery of the possession of the manors, messuages, lands, and hereditaments aforesaid, within the said county palatine, the said *C. D.* prays judgment, if the court of our lord the king here will or ought to have further cognizance of the plea aforesaid."

an alien enemy.[2] With respect to these pleas to the person, it is to be observed that they do not fall strictly within the definition of pleas in abatement, as above given; for they do not pray "that the writ be quashed," but pray judgment "if the plaintiff ought to be answered."

A plea in abatement to the count or declaration is founded on some objection applying immediately to the declaration and only by consequence affecting the writ. The only frequent case in which this kind of plea has occurred is where the objection is that of a variance in the declaration from the writ, which was always a fatal fault. Even in this case, however, the plea is now out of use, in consequence of a change of practice relative to the original writ that will be presently explained. [71]

A plea in abatement to the writ is such as is founded on some objection that applies to the writ itself; for example, that in an action on a joint contract it does not name as defendants all the joint contractors, but omits one or more of them.[3] Pleas of this latter kind have been very anciently

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2. "FORM OF PLEA IN ABATEMENT OF THE WRIT.

To the person of the plaintiff.

[In debt.]

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

C. D. ats *A. B.* } And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c.; and says that the said *A. B.* ought not to be answered to his writ and declaration aforesaid, because, he says, that the said *A. B.* is an alien, born, to wit, at Calais, in the kingdom of France, in parts beyond the seas, under the allegiance of the king of France, an enemy of our lord the now king, born of father and mother adhering to the said enemy; and that the said *A. B.* entered this kingdom without the safe conduct of our said lord the king; and this the said *C. D.* is ready to verify. Wherefore he prays judgment, if the said *A. B.* ought to be answered to his writ and declaration aforesaid, &c." See Wills' Gould's Plead., 421.

3. "PLEA IN ABATEMENT OF THE WRIT.

To the writ.

[In assumpsit.]

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

C. D. ats *A. B.* } And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c.; and prays judgment of the said writ and declaration, because, he says, that the said several supposed promises and undertakings in the said declaration mentioned (if any such were made) were made jointly with one *G. H.*, who is still living, to wit, at ———, and not by the said *C. D.* alone; and this the said *C. D.* is ready to verify. Wherefore, inasmuch as the said *G. H.* is not named in the said writ together with the said *C. D.*, he, the said *C. D.*, prays judgment of the said writ and declaration, and that the same may be quashed." See Wills' Gould's Plead., 450.

divided into such as relate **to the form of the writ,** and such as relate **to the action of the writ;** and those relating to its *form* have been again subdivided into such as are founded on objections *apparent on the writ itself,* and such as are founded *on matter extraneous.*

The effect of all pleas in abatement, if successful, is that the particular action is defeated. [72] **But the right of suit itself is not gone;** and the plaintiff, on obtaining a better form of writ, may maintain a new action, if the objection were founded on matter of abatement; or if the objection were to the disability of the person, he may bring a new action when that disability is removed. [73]

The actual power of using these pleas has been much abridged, and the whole law of original writs consequently rendered of less prominent importance than formerly, by a rule of practice laid down in modern times [and by stat. 2 Wm. IV. c. 39, which abolished original writs in personal actions].

With respect to such pleas in abatement as were founded on facts that could only be ascertained by examination of the writ itself, as, for example, variance between the writ and declaration, or erasure of the writ, it was always held a necessary matter of form, preparatory to pleading them, to **demand oyer** of the writ, that is, to demand *to hear it read,* which in the days of oral pleading was complied with by reading it aloud in open court, and, after the establishment of written pleadings, by exhibiting and (if required) delivering a copy of the instrument to the party who makes the demand. The Court of Common Pleas, however, in the 11 and 12 George II., and the King's Bench in the 19 George III., thought fit to establish it as a rule, that thenceforth oyer should not be granted of the original writ; and the indirect effect of this has consequently been to abolish in practice all pleas in abatement founded on objections of the kind here stated.

But there are pleas in abatement which do not require any examination of the writ itself. [74] For example, if in the declaration one only of two joint contractors is named defendant, this is sufficient to show that the same non-joinder exists in the writ; for as a variance between the writ and declaration is a fault, the defendant is entitled to assume that they agree with each other; and he may, consequently, without production of the writ, plead this non-

joinder as certainly existing in the latter instrument. So the plea that the writ was sued out pending another action, or pleas to the person of the plaintiff or defendant, require no examination of the writ itself; and there are many others to which the same remark applies. In all such cases, no oyer is necessary; and, therefore, pleas of this latter description may be, and are, in fact, still pleaded, notwithstanding the rule of practice which denies oyer of the writ.[4]

A plea in bar of the action may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect. [75] It is a substantial and conclusive answer to the action. It follows from this property, that, in general, it must either deny all or some essential part of the averments of fact in the declaration; or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, the defendant is said, in the language of pleading, to *traverse* the matter of the declaration; in the latter, to *confess and avoid* it. **Pleas in bar are consequently divided into pleas by way of traverse,[5] and pleas by way of confession and avoidance.[6]**

4. "It is important for a pleader to look well ahead to the consequences of the failure of a plea in abatement before he adopts it. The failure of a plea in abatement is the same in effect as a judgment by default. The plea admits the cause of action. In a case of damages, all is admitted but the amount; that may be contested. But nominal damages is, at all events, admitted. And as the allegations in a plea of abatement must be strictly proved as in a declaration, a failure in any material particular will be fatal. When the plea is successful, as the writ must be quashed and cannot be amended, that particular action fails. But in the new action the defendant is estopped by the plea in abatement from denying that there was once a good cause of action, though he may offer in defense any proper matter which has occurred since the plea was pleaded." Tyler's Intro. to Stephens on Pleading, p. 35.

5. "PLEA IN BAR, BY WAY OF TRAVERSE.

In covenant, on indenture of lease, for not repairing.

In the King's Bench, ——— *Term, in the* —— *year of the reign of King George the Fourth.*

C. D. ats *A. B.* } And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury when, &c.; and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, the said *C. D.*, because, he says, that the windows of the said messuage or tenement were not in any part thereof ruinous, in decay, or out of repair, in manner and form as the said *A. B.* hath above complained against him, the said *C. D.* And of this he puts himself upon the country."

We will continue our examination of the **process of pleading**, and will **first suppose that the defendant takes the course of pleading to the declaration in bar by way of traverse.** [77] In this case, **a question of fact** is at once raised between the parties, viz., whether the facts in the declaration which the traverse denies, be true. The parties having arrived at a specific point or matter, affirmed on the one side and denied on the other, the defendant is in general obliged to offer to refer this question to some **mode of trial,** and does this by annexing to the traverse an appropriate formula, proposing either a **trial by the country,** *i. e.*, by a jury, or such other method of decision as by law belongs to the particular point. If this be accepted by his adversary, the parties are then said to be **at issue,** and the question itself is called the *issue.* [78] Consequently, a party who thus traverses, annexing such formula, is said to **tender issue;** and the issue so tendered is called an **issue in fact.**

If it be next supposed that, instead of traversing, the defendant chooses to demur, a question is in this case also raised between the parties; and it is a **question of law,** viz., whether the declaration be sufficient, in point of law, to maintain the action. The defendant, as the party demurring, uses a formula referring that question to the proper

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6. PLEA IN BAR, BY WAY OF CONFESSION AND AVOIDANCE

In a like action.

In the King's Bench, ——— *Term, in the* —— *year of the reign of King George the Fourth.*

A. B. And the said *C. D.*, by ats *C. D* ———, his attorney, comes and defends the wrong and injury, when, &c.; and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, the said *C. D.*, because, he says, that after the said breach of covenant, and before the commencement of this suit, to wit, on the —— day of ———, in the year of our Lord ——, at ——— aforesaid, in the county aforesaid, the said *A. B.*, by his certain deed of release, sealed with his seal and now shown to the court here (the date whereof is the day and year last aforesaid), did remise, release, and forever quit-claim to the said *C. D.*, his heirs, executors, and administrators, all damages, cause and causes of action, breaches of covenant, debts, and demands whatsoever, which had then accrued to the said *A. B.*, or which the said *A. B.* then had against the said *C. D.*, as by the said deed of release, reference being thereto had, will fully appear. And this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action against him.

mode of decision, viz., **the judgment of the court,**[7] and as upon a traverse he tenders an issue in fact, so he is said, in this case, to tender **an issue in law.**

While upon a traverse a party is in general obliged to tender issue, upon a demurrer he always necessarily does so, for the only known form of a demurrer contains an appeal to the judgment of the court; but on the other hand, as will appear in a subsequent part of the work, a party may sometimes traverse or deny without offering any mode of trial. [79]

The issue, whether in fact or law, being thus *tendered,* **it is necessary, before the issue is complete, that it be accepted.**

The tender of the issue in law where the defendant demurs to the declaration, is necessarily accepted by the plaintiff; for he has no ground of objecting either to the *question itself* or the proposed *mode of decision.* He *accepts* or *joins* in the issue in law by a set form of words called **joinder in demurrer.**[8]

But the tender of the issue in fact where the defendant traverses the declaration is not necessarily accepted by the plaintiff; for first, he may consider the *traverse itself* as insufficient in law. By the traverse, the defendant may deny either the *whole* or a *part* of the declaration; and in the latter case, the traverse may, in the opinion of the plaintiff, be so framed as to involve a *part immaterial* or *insufficient* to *decide the action.* Again, he may consider the traverse as *defective in point of form,* and object to its sufficiency in law

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7. See forms of demurrer, *ante.*

8. JOINDER IN DEMURRER.

Upon the demurrer.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

A. B. v. *C. D.* } And the said *A. B.* says, that the said declaration and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law for him, the said *A. B.*, to have and maintain his aforesaid action against him, the said *C. D.*; and the said *A. B.* is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said *C. D.* hath not answered the said declaration, nor hitherto in any manner denied the same, the said *A. B.* prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him.

on that ground. So in his opinion the *mode of trial proposed* may, in point of law, be inapplicable to the particular kind of issue. On such grounds, therefore, **he has an option to demur to the traverse** as insufficient in law. The effect of this demurrer, however, would only be to postpone the acceptance of issue by a single stage. On the other hand, **supposing a demurrer not to be adopted,** the alternative course will be to accept the tendered issue of fact, and also the mode of trial which the traverse proposes; and this is done, in case of trial by jury, by a set form of words, called **a joinder in issue, or a similiter.**[9]

The issue in law or fact being thus tendered, and accepted on the other side, the parties are **at issue,** and the pleading is at an end.

We will now suppose the defendant to plead either one of the kinds of dilatory plea, or a plea in bar, by way of confession and avoidance. In either case, the plaintiff has the **option of demurring** to the pea, as being, in substance or form, an insufficient answer, in point of *law,* to the declaration, **or of pleading** to it by way of *traverse,* or by way of *confession and avoidance* of its allegations. [82] Such *pleading,* on the part of the plaintiff, is called **the replication.**[1]

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9. JOINDER IN ISSUE; OR, SIMILITER.

Upon the traverse, ante.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

A. B. v. *C. D.* } And the said *A. B.*, as to the plea of the said *C. D.* above pleaded, and whereof he hath put himself upon the country, doth the like.

1. REPLICATION, BY WAY OF CONFESSION AND AVOIDANCE.

Upon the plea.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

A. B. v. *C. D.* } And the said *A. B.* says that, by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said *C. D.*, because, he says, that he, the said *A. B.*, at the time of the making of the said supposed deed of release, was unlawfully imprisoned and detained in prison by the said *C. D.*, until, by force and duress of that imprisonment, he, the said *A. B.*, made the said supposed deed of release, as in the said plea mentioned; and this the said *A. B.* is ready to verify. Wherefore he prays judgment and his damages by him sustained by reason of the said breach of covenant to be adjudged to him.

If the replication be by way of traverse, it is in general necessary (as in the case of the plea) **that it should tender issue. So if the plaintiff demur, an issue in law is necessarily tendered**; and in either case the result is a joinder in issue. **But if the replication be in confession and avoidance**, the defendant may then, in his turn, either *demur*, or, by a *pleading, traverse* or *confess and avoid* its allegations. If such pleading take place, it is called **the rejoinder.**[2]

In the same manner, and subject to the same law of proceeding, viz., that of *demurring* or *traversing* or pleading *in confession and avoidance*, is conducted all the subsequent altercation to which the nature of the case may lead; and **the order and denominations of the alternate allegations of fact or pleadings throughout the whole series are as follows; Declaration, plea, replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter. After the sur-rebutter, the pleadings have no distinctive names**, for beyond that stage they are very seldom found to extend.

To whatever length of series the pleadings may happen to lead, by adherence to the plan here described, one of the parties must, at some period of the process, more or less remote, be brought either to *demur* or to *traverse;* for as no case can involve an inexhaustible store of new relevant matter, there must be somewhere a limit to pleading in the way of *confession and avoidance.* [83] **Whenever a traverse is at length produced, it comprises in general a tender of issue, and a demurrer necessarily involves a tender of issue,**

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2. REJOINDER, BY WAY OF TRAVERSE.

Upon the above replication.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

C. D. ats *A. B.* } And the said *C. D.* saith that, by reason of anything in the said replication alleged, the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because, he says, that the said *A. B.* freely and voluntarily made the said deed of release, and not by force and duress of imprisonment, in manner and form as by the said replication alleged. And of this the said *C. D.* puts himself upon the country.

In these examples the parties ultimately arrive at a *traverse;* but it may happen that in any part of the series a *demurrer*, instead of a traverse, may take place, which questions the sufficiency, in point of law, of the substance of the matter of the replication as in the case of the demurrer to the declaration already given, *ante.*

the consequence of which is, in either case, a joinder in issue, exactly upon the same principle as above expained with respect to the plea; so that the parties arrive at *issue*, after a long series of pleading, precisely in the same manner as when the process terminates at the earliest possible stage. [86]

A demurrer is never founded on matter collateral to the pleading which it opposes, but arises on the face of the statement itself; **a pleading is always founded on matter collateral.** This consideration will serve as a guide to determine whether a given objection should be brought forward by way of pleading or of demurrer. [87]

There are some **pleas and incidents of occasional occurrence, by which the progress of the pleading is sometimes broken or varied.**

The *pleas* here referred to are called **pleas puis darreign continuance,**[3] which set up new matter of defence which has arisen after a plea has been pleaded and since the last continuance, and which did not exist, and which the defendant had consequently no opportunity to plead *before* the last continuance. [88]

A plea puis darreign continuance is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. [89] **It may be either in bar or abatement,** and is followed, like other pleas, by a replication and other pleadings, till issue is attained upon it.[4]

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3. Since the last continuance.

4 "As the defendant is allowed, by the common law, to plead only *one* plea, of any one kind or class; so also, after having pleaded, within the time allowed for that purpose, any one matter of defence, he cannot, in general, and as a matter of right, retract and substitute another. If it were otherwise, the defendant might protract the proceedings interminably, by repeatedly shifting his ground of defence."

"But to this general rule there is an exception, when *new* matter of defence arises, *after* he has once pleaded, and after the last *continuance* (or adjournment) of the cause. For it would be unreasonable to preclude him from pleading matter thus arising, and which it was not in his power to plead in the first instance. The new plea, which this exception to the general rule allows, is called a plea *puis darrein continuance — since* (*or after*) *the last continuance.* It is here to be observed, that during the whole proceedings in a suit, from the time of the defendant's appearance, until its final determina-

Of the incidents of occasional occurrence by which the progress of the pleading is sometimes varied, some of the principal shall here be noticed; and first,

1. **The demand of view.**[5] [90]

2. **Voucher to warranty.**[6] [91]

3. **Demand of oyer.** [92] **Where either party alleges any deed, he is in general obliged to make profert of such deed,** that is, to produce it in court simultaneously with the pleading in which it is alleged. This, in the days of oral pleading, was an actual production in court. Since then it consists of a formal allegation that he shows the deed in court, it being, in fact, retained in his own custody.

Where profert is thus made by one of the parties, the other, before he pleads in answer, is entitled to demand oyer, that is, *to hear it read.* [93] The forms of pleading do not in general require that the whole of any instrument which there is occasion to allege should be set forth. So much only is stated as is material to the purpose. The other party, however, may reasonably desire to hear the whole,

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tion, the cause is to be *continued* (or as it is sometimes expressed, the parties must be 'continued' in court), from day to day, or from time to time, by regular entries, to be made for that purpose. And when any new matter of defence arises, *between* two of these continuances or adjournments, it may be pleaded *puis darrein continuance, before* the next continuance, notwithstanding the pendency of a prior plea."

"Pleas of this kind may be either in abatement or in bar; and may be pleaded, even after an issue joined, either in fact or in law, if the new matter has arisen *after* the issue was joined, and is pleaded *before* the next adjournment." Wills' Gould's Plead., 119-121 and notes.

5. At common law this right did not exist in personal actions, but only in real and mixed actions. Regulated now by statute and rules of court and allowable in all actions in the sound discretion of the court in the interests of justice. See Wills' Gould's Plead., 74 and notes.

6. A warranty is a covenant real, annexed to lands and tenements, whereby a man is bound to defend such lands and tenements for another person; and in case of eviction by title paramount, to give him lands of equal value. Voucher to warranty (*vocatio ad warrantizandum*) is the calling of such warrantor into court by the party warranted (when tenant in a real action, brought for recovery of such lands), to defend the suit for him, and the time of such voucher is after the defendant has counted. It lay in most real and mixed actions, but not in personal. It is now obsolete.

and this either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents, not set forth by the adverse pleader, some matter of answer. He is therefore allowed this privilege of hearing the deed read *verbatim*. When the *profert* was actually made in *open court*, the demand of oyer, and the oyer given upon it, took place in the same manner, and the course was, that on demand by one of the pleaders the deed was read aloud by the pleader on the other side. **By the present practice**, the attorney for the party by whom it is demanded, before he answers the pleading in which the profert is made, sends a note to the attorney on the other side, containing a demand of oyer, on which the latter is bound to carry to him the deed, and deliver to him a copy of it, if required, at the expense of the party demanding; and this is considered as oyer, or an actual reading of the deed in court. [94]

Oyer is demandable in all actions, real, personal, and mixed. By the present practice, it is not now granted either of a record or an original writ, and can be had only in the cases of deeds, probates, and letters of administration, &c., of which profert is made on the other side; of *private writings not under seal*, oyer has never been demandable. [95]

Oyer can be demanded only where profert is made. In all cases where profert is necessary, and where it is also, in fact, made, the opposite party has a right, if he pleases, to demand oyer; **but if it be unnecessarily made, this does not entitle to oyer; and so, if profert be omitted when it ought to have been made, the adversary cannot have oyer, but must demur.**

When a deed is pleaded with profert, it is supposed to *remain in court* during all the term in which it is pleaded, but no longer, unless the opposite party, during that term, plead in denial of the deed, in which case it is supposed to remain in court till the action is determined. Hence it is a rule that **oyer cannot be demanded in a subsequent term to that in which profert is made.**

A party having a right to demand oyer is yet not obliged,

in all cases, to exercise that right, nor is he obliged, in all cases, after demanding it, to notice it in the pleading that he afterwards files or delivers. [96] **Sometimes, however, he is obliged to do both,** viz., where he has occasion to found his answer upon any matter contained in the deed of which profert is made, and not set forth by his adversary. In these cases, the only admissible method of making such matter appear to the court is to demand oyer, and from the copy given set forth the whole deed *verbatim* in his pleading.

When oyer is demanded and the deed set forth, as above explained, the effect is as if it had been set forth in the first instance by the opposite party, and the tenor of the deed, as it appears upon oyer, is consequently considered as forming a part of the precedent pleading. [97] Therefore if the deed, when so set forth by the plea, be found to contain in itself matter of objection or answer to the plaintiff's case, as stated in the declaration, the defendant's course is to *demur,* as for matter apparent on the face of the declaration, and it would be improper to make the objection the subject of *plea.*[7]

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7. Profert and oyer are still necessary in some states. See the whole subject and the modern practice well explained in Wills' Gould's Plead., 75-87 and notes.

The following is an example of the manner in which the demand of oyer is entered and the deed set forth in the pleading:

"PLEA IN BAR.

To debt on bond.

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

C. D. ats *A. B.* And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury when, &c., and craves oyer of the said writing obligatory, and it is read to him, &c. He also craves oyer of the condition of the said writing obligatory, and it is read to him in these words: "Whereas" (here the condition of the bond, which shall be supposed to be for payment of one hundred pounds on a certain day, is set forth *verbatim*); which, being read and heard, the said *C. D.* says that the said *A. B.* ought not to have or maintain his aforesaid action against him, because, he says, that he, the said *C. D.*, on the said —— day of ———, in the year aforesaid, in the said writing obligatory mentioned, paid to the said *A. B.* the said sum of one hundred pounds in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at ——— aforesaid, in the county aforesaid; and this, the said *C. D.* is ready to verify. Wherefore he prays judgment, if the said *A. B.* ought to have or maintain his aforesaid action against him.

4. Prayer of an imparlance.

By the ancient practice, if a party found himself unprepared to answer the last pleading of his adversary immediately, his course was to pray the court to allow him a further day for that purpose; which was accordingly granted by the court to any day that, in their discretion, they might award, either in the same or the next succeeding term. [98] The party was in this case said to pray, and the court to grant, an **imparlance**[8] (*interlocutio* or *interloquela*), a term derived from the supposition that in this interval the parties might *talk together* and amicably settle their controversy.

An imparlance was grantable in almost all actions, real, personal, and mixed.

The prayer of imparlance, when made by the defendant prior to his plea, **was either general or special.** The first was simply a prayer for leave to imparl. Of such **general** imparlance it was a consequence that the defendant was afterwards precluded from certain proceedings of a dilatory tendency, which might before have been competent to him, such as *oyer*, or a plea *to the jurisdiction*, or *in abatement*. [99] Accordingly, if he wished to preserve his right to these advantages, he varied the form of his prayer, and made it with a reservation of such right. If his object was to preserve the right of pleading in *abatement*, he prayed what is called a **special imparlance.**

A special imparlance, "saving all advantages and exceptions, as well to the writ as to the declaration," would entitle the party to plead in *abatement* afterwards, but not to the *jurisdiction;* and therefore if he wished to preserve the power of doing this also, he resorted to another kind of special imparlance, differing from the former only in this: that it contained a saving of "*all* advantages and exceptions whatsoever." [100] This is called in the books a **general special imparlance;** and it would seem that the effect of an imparlance of this description is to preserve the power not only of pleading all dilatory pleas, but of demanding *oyer* and a *view.*

With respect to most of those incidents in pleading, the opposite party has a right, if he pleases, to oppose the prayer made on the other side; and for this purpose he was entitled in the ancient practice of pleading, to **demur** or **plead** to it, as if it were a statement of fact made in the

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8. Questions arising upon the right to oyer are now generally settled upon application to the court or judge. The practice has in some states been changed and the right to inspection or copies of paper extended by statute. See, generally, Wills' Gould's Plead., 75 and notes, and local works on practice.

direct course of the pleading. [102] Thus if a party demanded oyer in a case where, upon the fact of the pleading, his adversary conceived it to be not demandable, the latter might *demur*, or if he had any matter of fact to allege as a ground why the oyer could not be demanded, he might *plead* such matter. If he pleaded, the allegation was called a **counterplea to the oyer.**[9] All pleadings of this incidental kind, diverging from the main series of the allegations, are termed *counterpleas*. On the counterplea there might happen to be a replication and other subsequent pleadings; and so the parties might come to *issue* in law or in fact on this collateral subject, in the same manner as upon the principal matters in controversy. [103] These collateral or incidental pleadings, however, though according to the principle of the science they may occur, have now fallen into complete disuse in point of practice.

Questions arising upon the right to oyer are now generally settled upon application to the court or judge.

Supposing the cause to be at issue, the next proceeding is to make a transcript upon paper of the whole pleadings that have been filed or delivered between the parties. This transcript, when the issue joined is an issue of law, is called the **demurrer-book**; when an issue in fact, it is called, in the King's Bench, in some cases **the issue**, in others, the **paper-book**, and in the Common Pleas, **the issue.**[1] It contains not only the pleadings, but also entries, according to the ancient forms used in recording, of the appearance of the parties, the continuances, and other acts supposed to be done in court up to the period of issue joined, even though such entries have not formed part of the pleadings as filed or delivered; and it concludes with an entry of an award by the court of the mode of decision tendered and accepted by the pleadings. [104] The making of this transcript upon an issue in law is called **making up the demurrer-book**; upon an issue in fact, **making up the issue or paper-book.**[2] The

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9. "In its more usual signification 'imparlance' is an allowance to the defendant of time to plead," and is regulated by rules of practice. See Wills' Gould's Plead., 73.

1. See Wills' Gould's Plead., 106.

2. "ENTRY OF ISSUE ON DEMURRER, WITH AN IMPARLANCE.

In the King's Bench, by original. In an action of covenant.

As yet of ——— Term, in the ——— year of the reign of King George the Fourth.

Witness Sir Charles Abbott, knight.

———, to wit, *A. B.* puts in his place *E. F.*, his attorney, against *C. D.*, in a plea of breach of covenant.

———, to wit, *C. D.* puts in his place *G. H.*, his attorney, at the suit

The next subject for consideration is **the manner in which the issue is decided.** [110]

The decision of **issues in law** is vested, as it always has been, exclusively in the **judges of the court.**[5] Therefore when, upon a demurrer, the issue in law has been entered on record in the manner above described, the next step is to **move for a concilium**; that is, to move to have a day appointed on which the court will hear the counsel of the parties argue the demurrer. [111] And such day being appointed, the cause is then **entered for argument** accordingly. On that day, or as soon afterwards as the business of the court will permit, it is accordingly **argued viva voce in court by the respective counsel** for the parties; and the judges, in the same manner and place, pronounce their **decision according to the majority of voices.**

The decision of the issue in fact is called the trial. The different methods of trial now in force are the following: The trial by **jury,** by the **grand assize,** by the **record,** by **certificate,** by **witnesses,** by **inspection,** and by **wager of law.**[6]

Every mode of trial, however, except that by jury, is of rare admissibility, being not only confined to a few questions of a *certain nature,* but in general also, if not universally, to such questions when arising in a *certain form of issue.* [112] And to all issues not thus specially provided for, the trial by jury applies, as the ordinary and only legitimate method. On the other hand, however, with respect to these occasional modes of trial *when competent,* they are in general *exclusively appropriate.*

First, **the ordinary method, or trial by jury.** When the parties have mutually referred the issue to decision by jury, or (as it is technically termed), have *put themselves upon the country,* there is entered upon the roll (as in all other cases), the award of the mode of decision so adopted. In the case of the trial by jury, that award directs the issuing of the **writ of venire facias,** commanding the sheriff of the county where the facts are alleged by the pleading to have

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5. So also in this country.

6. See Blackstone (vol. 1), Trial; Wills' Gould's Plead., 107.

pleading as at *common law;* the leave to do which is granted, as of course, upon proper and reasonable terms, including the payment of the costs of the application, and sometimes the whole costs of the cause up to that time. **And even after the judgment is signed, and up to the latest period of the action, amendment is in most cases allowable at the discretion of the court, under certain statutes** passed for allowing amendments of the record; and in late times the judges have been much more liberal than formerly in the exercise of this discretion. **Amendments are, however, always limited by due consideration of the rights of the opposite party**; and where by the amendment he would be prejudiced or exposed to unreasonable delay, it is not allowed.[3]

To return to the main course of proceeding. [107] The pleadings and issue being adjusted by the making up, delivery, and return of the demurrer-book, issue, or paper-book, **the next step is to enter the issue on record.** The pleadings are framed as if they were copied from a roll of the oral pleadings. Such a roll did, in the time of oral pleading, exist, and still exists in contemplation of law; but no roll is now actually prepared or record made till after issue joined and made up, in manner above described. At that period, however, a record is drawn up on a parchment roll. This proceeding is called **entering the issue**, and the roll on which the entry is made is called **the issue roll.** The issue roll contains an entry of *the term,* of which the demurrer-book, issue, or paper-book is entitled, and (in the King's Bench) the *warrants of attorney* supposed to have been given by the parties at the commencement of the cause, authorizing their attorneys to appear for them respectively, and then proceeds with a transcript of the declaration and subsequent pleadings, continuances, and award of the mode of decision, as contained in the demurrer-book, issue, or paper-book.[4] **When drawn up, it is filed in the proper office of the court.** [108]

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3. See Wills' Gould's Plead., 105; Blackstone (vol. 1), Amendment. Consult local works on practice.

4. See Wills' Gould's Plead., 106. In this country the original papers on file constitute the record without enrolment. Not every paper on file, however, is a part of the record.

After hearing the evidence of the witnesses, the addresses of counsel, and the charge of the judge, the jury pronounce their **verdict**, which the law requires to be **unanimously** given.[9] [116] The verdict is usually in general terms, "for the plaintiff," or "for the defendant;" finding, at the same time (in case of verdict for the plaintiff, and where *damages* are claimed by the action), the amount of **damages** to which they think him entitled.

The principles upon which the law requires the jury to form their decision are these,—

1. **They are to take no matter into consideration but the question in issue.**

2. **They are bound to give their verdict for the party who upon the proof appears to them to have succeeded in establishing his side of the issue.** [117]

3. **The burden of proof, generally, is upon that party who, in pleading, maintained the affirmative of the issue;**[1] for a *negative* is in general incapable of proof. Consequently, unless he succeed in proving that affirmative, the jury are to consider the opposite proposition, or negative of the issue, as established.

Under this head comes to be considered **the doctrine of variance.** The proof offered may in some cases *wholly* fail to support the affirmative of the issue; but in others, it may fail by a **disagreement in some particular point or points only between the allegation and the evidence. Such disagreement, when upon a material point, is called a variance,** and is as fatal to the party on whom the proof lies as is a total failure of evidence, the jury being bound, upon *variance,* to find the issue against him.[2] [118]

The principle is not, however, so rigorously observed as to oblige the party on whom the proof lies to make good his allegation to the *letter.* **It is enough if the substance of the issue is exactly proved;** and a variance in *mere form,* or in *matter quite immaterial,* will not be regarded. [119]

The verdict, when given, is afterwards drawn up in form,

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9. In some states a unanimous verdict is not required. Consult local statutes and works on practice.

1. Necessarily so now.

2. Still the rule. See Evidence, *ante.*

and entered on the back of the record of nisi prius. This is done, upon trials in the King's Bench in London and Middlesex, by the attorney for the successful party; in other cases by an officer of the court. **Such entry is called the postea,** from the word with which at a former period (when the proceedings were in Latin) it commenced. The postea is drawn up *in the negative or affirmative of the issue.*[3]

Such is the course of trial at *nisi prius,* in its direct and simple form; and **the practice of a trial at bar is, in a general view, the same.** [120] Trials by jury, however, whether at bar or *nisi prius,* are subject to **certain varieties of proceeding,** some of which require to be here noticed.

If at the trial a point of law arises, either as to the legal effect or the admissibility of the evidence, the usual course is for the judge to decide these matters. But it may happen that one of the parties is dissatisfied with the decision, and may wish to have it revised by a superior jurisdiction. If he is content to refer it to the superior court in which the issue was joined, and out of which it is sent (called, by way of distinction from the court at *nisi prius,* the court *in banc*), his course is to **move** in that court **for a new trial;**[4]

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3. The verdict with us is entered in the book of records kept in every court.

"FORM OF POSTEA.

For the plaintiff, if tried at nisi prius in London or Middlesex.

Afterwards, that is to say, on the day and at the place within contained, before the right honorable Sir Charles Abbott, knight, the chief justice within mentioned (John Henry Abbott, esquire, being associated to the said chief justice, according to the form of the statute in such case made and provided), come as well the within-named *A. B.* as the said *C. D.*, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath, that the said *A. B.* was, at the time of the making of the said deed of release within mentioned, unlawfully imprisoned and detained in prison by the said *C. D.*, until, by force and duress of that imprisonment, he, the said *A. B.*, made the said deed of release, in manner and form as the said *A. B.* hath within alleged. And they assess the damages of the said *A. B.*, by reason of the said breach of covenant within assigned, over and above his costs and charges by him about his suit in this behalf expended, to fifty pounds; and for those costs and charges to forty shillings. Therefore, &c."

4. See Wills' Gould's Plead., 109.

a proceeding of a subsequent period, which will be considered hereafter in its proper place. [121] But as the *nisi prius* judge himself frequently belongs to that court, a party is often desirous, under such circumstances, to obtain the **revision of some court of error** having authority to correct the decision. For this purpose it becomes **necessary to put the question of law on record** for the information of such court of error; and this is to be done, pending the trial, in a form marked out by an old statute (Westminster 2, 13 Edward I. c. 31). **The party excepting to the opinion of the judge tenders him a bill of exceptions,** that is, a statement in writing of the objection made by the party to his decision, to which statement, if truly made, the judge is bound to set his seal in confirmation of its accuracy.[5] The cause then proceeds to verdict, as usual, and the opposite party, for whom the verdict is given, is entitled, as in the common course, to judgment upon such verdict in the court in banc, for that court takes no notice of the bill of exceptions. **But the whole record being afterwards removed to the appellate court by writ of error,**[6] the bill of exceptions is then taken into consideration in the latter court, and there decided.

Though the judge usually gives his opinion on such points of law as above supposed, yet it may happen that, for various reasons, he is not required by the parties, or does not wish to do so. [122] In such case, **several different courses may be pursued for determining the question of law.**

First, **a party disputing the legal effect of any evidence offered may demur to the evidence. A demurrer to evi-**

5. In this country the usual practice is to take exceptions when necessary, and to settle them all at once in one bill of exceptions after the trial is over. See Wills' Gould's Plead., 111, and local works on practice. See the whole course of proceeding on a bill of exceptions minutely stated. Money v. Leach, 3 Burr. 1692; and, on the subject of bill of exceptions generally, see Enfield v. Hills, 2 Lev. 236; Wright v. Sharp, Salk. 288; Fabrigas v. Mostyn, 2 Black. 929; Davies v. Pierce, 2 T. R. 125; Gardner v. Bailie, 1 Bos. & Pul. 32; Bell v. Potts, 5 East. 49.

6. The writ of error issues from the appellate court. By statute probably in most states an appeal may be prayed and perfected in the trial court. See Wills' Gould's Plead., 112.

dence is analogous to a demurrer in pleading, the party from whom it comes declaring that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party, the jury are in general discharged from giving any verdict, and the demurrer, being entered *on record,* is afterwards argued and decided in the court in banc, and the judgment there given upon it may ultimately be brought before a court of error.[7]

A more common, because more convenient, **course** than this to determine the legal effect of the evidence, **is to obtain from the jury a special verdict,** in lieu of that *general* one, of which the form has been already described; for the jury have an option, instead of finding the *negative or affirmative of the issue,* as in a general verdict, to find *all the facts of the case as disclosed upon the evidence before them,* and, after so setting them forth, to conclude to the following effect: "That they are ignorant, in point of law, on which side they ought, upon these facts, to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, &c.; but if the court are of an opposite opinion, then *vice versa.*" [123] This form of finding is called a *special verdict.* When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. **It is settled, under the correction of the judge, by the counsel and attorneys on either side, according to the state of facts as found by the jury,** with respect to all particulars on which they have delivered an opinion, and with respect to other particulars, according to the state of facts which it is agreed that they *ought* to find upon the evidence before them. [124] **The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record,** and the

7. See Wills' Gould's Plead., 108, 138-150, and notes. Now in many states a motion to direct a verdict, for a nonsuit, or some analogous proceeding takes its place. Id.

question of law arising on the facts found is **argued before the court in banc, and decided by that court as in case of demurrer.** If the party be dissatisfied with their decision, he may afterwards resort to a court of error.[8]

It is a matter entirely in the *option of the jury* whether their verdict shall be general or special. **The party objecting in point of law cannot, therefore, insist on having a special verdict,** and may consequently be driven to *demur to the evidence,* at least if he wishes to put the objection *on record,* without which no writ of error can be brought nor the decision of a *court of error* obtained. But if the object be merely to obtain the decision of the court in banc, and it is not wished to put the legal question *on record,* in a view to a *writ of error,* then the more common, because the cheaper and shorter, course is neither to take a *special verdict* nor *demur to the evidence,* but to take **a general verdict, subject to a special case;** that is, to a written statement of all the facts of the case, drawn up for the opinion of the court in banc, by the counsel and attorneys on either side, under correction of the judge at *nisi prius,* according to the principle of a special verdict, as above explained. [125] The party for whom the general verdict is so given is of course not entitled to judgment till the court in banc has decided on the special case; and according to the result of that decision, the verdict is ultimately entered either for him or his adversary. **A special case is not** (like a special verdict) **entered on record,** and, consequently, a writ of error cannot be brought on this decision.[9]

The proceedings on trial by jury, at nisi prius or at bar, terminate with the verdict.

In case of trial at *nisi prius,* the return day of the last jury process, the *distringas* or *habeas corpora* (which, like all other judicial writs, is made returnable into the court from which it issues), always falls on a day in term subsequent to the

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8. See, generally, Wills' Gould's Plead., 108, 177.

9. See, generally, Wills' Gould's Plead., 108, 177. The following works may be consulted in this connection as to the common law practice. Tidd's Practice; Chitty's General Practice; Burrill's (N. Y.) Practice; Graham's (N. Y.) Practice; Green's New (Mich.) Practice; Puterburgh's (Ill.) Common Law Pleading and Practice.

trial, and forms the next *continuance* of the cause. On the day given by this continuance, therefore (which is called the **day in banc**), the parties are supposed again to appear in the court in banc, and are in a condition to receive judgment. On the other hand, in case of trial at bar, the trial takes place on or after the return day of the last jury process; and, therefore, immediately after the trial, the parties are in court, so that judgment might be given. [126] In either case, however, a period of four days elapses before, by the practice of the court, judgment can be actually obtained. And during this period **certain proceedings may be taken by the unsuccessful party to avoid the effect of the verdict.** He may move the court to grant a **new trial,** or **to arrest the judgment,** or **to give judgment non obstante veredicto,** or **to award a repleader,** or **to award a venire facias de novo.**

1. With respect to a **new trial.** It may happen that one of the parties may be dissatisfied with the opinion of the *nisi prius* judge, expressed on the trial, whether relating to the effect or the admissibility of evidencce, or may think the evidence against him insufficient in law, where no adverse opinion has been expressed by the judge, and yet may not have obtained a special verdict, or demurred to the evidence, or tendered a bill of exceptions. He is at liberty, therefore, after the trial, and during the period above mentioned, to move the court in banc to grant a *new trial,* on the ground of the judge's having **misdirected the jury,** or having **admitted or refused evidence contrary to law,** or (where there was no adverse direction of the judge) on the ground that the jury gave their **verdict contrary to the evidence, or on evidence insufficient in law.** [127] And resort may be had to the same remedy in other cases, where justice appears not to have been done on the first trial, as where the verdict, though not wholly contrary to evidence, or on insufficient evidence in point of law, is manifestly wrong in point of discretion, as **contrary to the weight of the evidence,** and on that ground disapproved by the *nisi prius* judge. So a new trial may be moved for **where a new and material fact has come to light since the trial,** which the

party did not know, and had not the means of proving before the jury, or **where the damages given by the verdict are excessive**, or **where the jury have misconducted themselves**, as by casting lots to determine their verdict, etc. In these and the like instances, the court will, on motion, and in the exercise of their discretion, under all the circumstances of the case, grant a new trial, that opportunity may be given for a more satisfactory decision of the issue. A new jury process consequently issues, and the cause comes on to be tried *de novo*. [128] But except on such grounds as these, tending manifestly to show that the discretion of the jury has not been legally or properly exercised, a new trial can never be obtained; for it is a great principle of law that **the decision of a jury upon an issue in fact is in general irreversible and conclusive.**[1]

2. Again, **the unsuccessful party may move in arrest of judgment**; that is, that the judgment for the plaintiff be arrested or withheld, on the ground that there is some **error appearing on the face of the record which vitiates the proceedings.** In consequence of such error, on whatever part of the record it may arise, from the commencement of the suit to this period, the court are bound to arrest the judgment. It is, however, **only with respect to objections apparent on the record** that such motions can be made. Nor can it be made, generally speaking, in respect of *formal* objections. This was formally otherwise, and judgments were constantly arrested for errors of mere form; but this abuse has been long remedied by certain statutes, passed at different periods, to correct inconveniences of this kind, and commonly called **the statutes of amendments and jeofails, by the effect of which judgment, at the present day, cannot in general be arrested for any objection of form.**[2]

3. **If the verdict be for the defendant, the plaintiff, in some cases, moves for judgment, non obstante veredicto**; that is, that judgment be given in his own favor, *without*

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1. The literature on New Trials is voluminous. See Wills' Gould's Plead., 109; Graham & Waterman on New Trials; Baylies on New Trials; Hayne on New Trials.

2. As to motions in arrest of judgment, see Wills' Gould's Plead., ch. 5.

regard to the verdict obtained by the defendant.[3] [129] This motion is made in cases where, after a pleading by the defendant in confession and avoidance, as, for example, a plea, in bar and issue joined thereon, and verdict found for the defendant, the plaintiff, on retrospective examination of the record, conceives that such plea was bad in substance, and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course the verdict, which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea, being in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. In such case, therefore, the court will give judgment for the plaintiff *without regard to the verdict;* and this, for the reason above explained, is also called a judgment *as upon confession.* **Sometimes it may be expedient for the plaintiff to move for judgment non obstante, etc., even though the verdict be in his own favor;** for if in such a case as above described he takes judgment *as upon the verdict,* it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession.* [130]

4. **The motion for a repleader** is made where the unsuccessful party, on examination of the pleadings, conceives that the issue joined was **an immaterial issue,** that is, not taken on a point proper to decide the action.[4] For either of the parties may, from misapprehension of law, or oversight, have paseed over without demurrer a statement on the other side insufficient and immaterial in law; and an issue in fact may have been ultimately joined on such immaterial statement; and so the issue will be immaterial, though the parties have made it the point in controversy between them. In such cases, therefore, the court, not knowing for whom to give judgment, will *award a repleader,* that is, will order the parties to plead *de novo,* for the pur-

3. This motion is granted only in very clear cases, e. g., where a plea in bar *confessing* a good declaration is clearly frivolous, or destitute of substance. Wills' Gould's Plead., 171.

4. See Wills' Gould's Plead., 165, 172.

pose of obtaining a better issue. [131] The court will, however, never grant a repleader except when complete justice cannot otherwise be obtained.

5. **A venire facias de novo,** that is, a new writ of *venire facias,* will be awarded when, by reason of some irregularity or defect in the proceedings on the first *venire,* or the trial, the proper effect of that writ has been frustrated, or the verdict become void in law; as, for example, where the jury has been improperly chosen, or given an uncertain or ambiguous or defective verdict. The consequence and object of a new *venire* are of course to obtain a new trial; and, accordingly, **this proceeding is, in substance, the same with a motion for a new trial.** Where, however, the unsuccessful party objects to the verdict in respect of some *irregularity or error in the practical course of proceeding,* rather than on the merits, the form of the application is a motion for a *venire de novo,* and not for a new trial.[5] [132]

The other modes of trial, which are of rare and limited application, may be dismissed in few words.

The trial by the grand assize [obsolete] is very similar to the common trial by jury. There is only one case in which it is applicable, and that is to try the issue upon the question of right in a writ of right. The grand assize consists of a jury of sixteen persons.

The trial by the record applies to cases where an issue of nul tiel record[6] is joined in any action. [133] If a record be asserted on one side to exist, and the opposite party deny its existence, under the form of traverse, that *there is no such record* remaining in court as alleged, and issue be joined thereon, this is called **an issue of nul tiel record, and the court awards in such case a trial by inspection and examination of the record.** Upon this, the party affirming its existence is bound to produce it in court on a day given for the purpose; and if he fail to do so, judgment is given for his adversary. [134] The trial by record is not only in use when an issue of this kind happens to arise for decision,

5. See Wills' Gould's Plead., 110, 178.

6. No such record. See Wills' Gould's Plead., 480, 483; 3 Black. Com. 330, 331 (vol. 1); 2 Chitty Plead., 488.

but it is the only legitimate mode of trying such issue, and **the parties cannot put themselves upon the country.**

The trial by certificate is now of very rare occurrence, but is still in force upon certain issues; one of the most important of which is the issue of a *ne unques accouple en loial matrimonie.* This arises in the *action of dower*, in which the tenant may plead in bar, that the demandant "*was never accoupled* to her alleged husband *in lawful matrimony.*" Issue being joined upon this, the court awards that it be tried by the diocesan of the place where the parish church, in which the marriage is alleged to have been had, is situate, and that the result be certified to them by the ordinary at a given day. It is said that this is a form of issue which can arise only in a *dower.* The trial by certificate is, when competent, the *only legitimate mode*, and the issue cannot be tried by a jury.

The trial by witnesses and that by inspection are in very few instances legally competent,[7] and are not now known in practice. [135] It seems, however, that the former is still applicable, as anciently, to an issue *arising on the death of the husband, in an action of dower*, and in some other cases; and that the proof *by inspection* is also in some instances still admissible; for example, if in any action, upon a plea of *parol demurrer*, issue be taken on the nonage. In case of trial by *witnesses* the court, upon issue joined, awards that both parties produce in court, at a given day, their respective witnesses [by statute, in some of the States, where a jury is not demanded in a civil action, the court may try any issue of fact without a jury]; on trial by *inspection*, that the subject to be inspected be brought into court; for example, that the guardian of the infant bring him into court on a certain day to be viewed. In either case, the judges examine and decide, and the judgment is pronounced accordingly. With respect to trial by *inspection*, however, even when competent, it seems to be not a mode so exclusively appropriate but that the parties may by consent refer the question to a jury, and both with respect to this trial and that by *witnesses*, it is laid down that if, after the evidence, the judges are still unable to satisfy themselves on the fact, they have in general a discretion then to send the parties *to the country.* [136] [8]

The trial by wager of law has also fallen into complete disuse; but in point of law it seems to be still competent in most of the cases to which it anciently applied. The most important and best established of these cases is the issue of **nil debet,** arising in an action of **debt on simple contract,** or the issue of **non detinet** in an action of **detinue.** In the declaration in these actions, as in almost all others, the plaintiff concludes by offering *his suit* (of which the ancient meaning was *followers* or *witnesses*, though the words are now retained as a mere form), to prove the truth of his claim. On the other hand, if the defendant, by a plea of *nil debet* or *non detinet*, deny the debt or detention,

7. See Blackstone (vol. 1). 8. Id.

he may conclude by offering to establish the truth of such plea "*against the plaintiff and his suit, in such manner as the court shall direct.*" Upon this the court awards the *wager of law*, and the form of this proceeding, when so awarded, is that the defendant brings into court with him eleven of his neighbors, and for himself makes oath that he does not owe the debt or detain the property, as alleged; and then the eleven also swear that they believe him to speak the truth; and the defendant is then entitled to judgment. [137] With respect to this mode of trial, however, though the defendant has thus the power of resorting to it, he is not obliged to do so. He is at liberty, if he pleases, to put himself *upon the country;* the trial by jury being a mode of decision always applicable to the same questions on which *law* may be *waged*, and the mode, in fact, always applied to them in the modern practice.

As the issue is the question which the parties themselves have, by their pleading, mutually selected for decision, they are in general considered as having *mutually put the fate of the cause upon that question;* and as soon, therefore, as the issue is decided in favor of one of them, that party in general becomes victor in the suit, and nothing remains but to award the judicial consequence which the law attaches to such success. [138] **The award of this judicial consequence is called the judgment**, and is the province of the judges of the court.

The nature of the judgment varies according to the nature of the action, the plea, the issue, and the manner and result of the decision.

It shall be first supposed that the issue is decided for the plaintiff.

In this case, **if it be an issue in law, arising on a dilatory plea, the judgment is only that the defendant answer over,** which is called a judgment of **respondeat ouster.**[9] The pleading is accordingly resumed, and the action proceeds. This judgment, therefore, does not fall within the definition of the term just given, but is of an anomalous kind. **Upon all other issues in law, and, in general, all issues in fact, the judgment is that the plaintiff do recover,** which is called a judgment **quod recuperet.** The nature of such judgment, more particularly considered, is as follows: **It is of two kinds, interlocutory and final. If the action sound in dam-**

9. Wills' Gould's Plead., 473.

ages, that is, be brought, not for specific recovery of lands, goods, or sums of money (as is the case in real and mixed actions or the personal actions of debt and detinue), but for *damages only,* as in covenant, trespass, etc., **and if the issue be an issue in law, or any issue in fact not tried by jury, then the judgment is only that the plaintiff ought to recover his damages, without specifying their amount**; for as there has been no trial by jury in the case, the *amount* of damages is not yet ascertained. [139] The judgment is then said to **interlocutory.** On such interlocutory judgment the court does not in general itself undertake the office of assessing the damages, but issues a **writ of inquiry**, directed to the sheriff of the county where the facts are alleged by the pleading to have occurred, commanding him to inquire into the amount of the damage sustained, "by the oath of twelve good and lawful men of his county," and to return such inquisition, when made, to the court.[1] **Upon the return of the inquisition, the plaintiff is entitled to another judgment, viz., that he recover the amount of the damages so assessed**; and this is called **final judgment. But if the issue be in fact, and was tried by a jury, then the jury, at the same time that they tried the issue, assessed the damages.** In this case, therefore, no writ of inquiry is necessary, and the judgment is final in the first instance, and to the same effect as just mentioned, viz., *that the plaintiff do recover the damages assessed.* **Again, if the action do not sound in damages, the judgment is in this case also (in general) in the first instance final**, and to this effect, *that the plaintiff recover seisin of the land, etc.,* or *recover the debt, etc.* [140] **But there is, besides this, in mixed actions, a judgment for damages also**; and this is either given at the same time with that for recovery of seisin, if the damages have been assessed by a jury, or if not so assessed, a writ of inquiry issues, and a second judgment is given for the amount found by the inquisition.

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1. Damages upon an interlocutory judgment are, in this country, usually assessed in court by a jury and not before the sheriff. As to the proceedings on a writ of inquiry, however, see 2 Arch. Pract. 19, 1st ed.

The issue shall next be supposed to be decided for the defendant.

In this case, if the issue, whether of fact or law, arise on a dilatory plea, the judgment is, that the writ (or bill) be quashed, *quod breve* (or *billa*) *cassetur,* **upon such pleas as are in abatement of the writ or bill, and that the pleading remain without day, until, etc., upon such pleas as are in suspension only**; the effect in the first case, of course, being that the suit is defeated, but with liberty to the plaintiff to prosecute a better writ or bill; in the second, that the suit is suspended until the objection be removed.[2] **If the issue arise upon a declaration or peremptory plea, the judgment is, in general, that the plaintiff take nothing by his writ (or bill), and that the defendant go thereof without day, etc.,** which is called a judgment of **nil capiat per breve** or *per billam.*

Judgment has hitherto been supposed to be awarded only *upon the decision of an issue.* **There are several cases, however, in which judgment may be given, though no issue have arisen.** An action may be cut off in its progress and come to premature termination by the fault of one of the parties in failing to pursue his litigation; and this may happen either with the intention of abandoning the claim or defence, or from failing to follow them up within the periods which the practice of the court in each particular case prescribes. In such cases, the opposite party becomes victor in the suit, as well as where an issue has been joined and is decided in his favor, and is at once entitled to judgment. Thus in a real (though not in a personal) action, **if the defendant holds out against the process, judgment may be given against him for default of appearance.**[3] [142] So in actions real, mixed, or personal, **if after appearance he neither pleads nor demurs, or if after plea he fails to maintain his pleading till issue joined, by rejoinder, rebutter, etc., judgment will be given against him for want of plea,** which is called judgment by **nil dicit. So, if, instead of a**

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2. See Wills' Gould's Plead., 472.

3. In all kinds of actions in this country, if the defendant does not appear, judgment will as a general rule be rendered against him by default.

plea, his attorney says he is not informed of any answer to be given to the action, judgment will be given against him; and it is in that case called a judgment by **non sum informatus.** Again, instead of a plea, **he may choose to confess the action,** or, after pleading, he may at any time before trial both **confess the action and withdraw his plea or other allegations;** and the judgment against him in these two cases is called a **judgment by confession,** or by *confession relicta verificatione.* On the other hand, **judgment may be given against the plaintiff, in any class of actions, for not declaring or replying or surrejoining, etc.,** or for not entering the issue; and these are called judgments of **non pros.** (from *non prosequitur*). So if he chooses, at any stage of the action after appearance and before judgment, to say that he "**will not further prosecute his suit,**" or that he "**withdraws his suit,**" or (in case of plea in abatement) **prays that his "writ" or "bill" "may be quashed,** that he may sue or exhibit a better one," there is judgment against him of **nolle prosequi, retraxit, or cassetur breve, or billa,** in these cases respectively. [143] Again, **judgment of nonsuit may pass against the plaintiff,** which happens when, on trial by jury, the plaintiff, on being called or demanded, at the instance of the defendant, to be present in court while the jury give their verdict, fails to make his appearance. In this case no verdict is given, but judgment of nonsuit passes against the plaintiff. **So if, after issue is joined, the plaintiff neglects to bring such issue on to be tried in due time,** as limited by the course and practice of the court in the particular case, judgment will also be given against him for this default; and it is called **judgment as in case of nonsuit.**

These judgments by default, confession, etc., when given for the plaintiff, are generally quod recuperet, and may be either interlocutory or final, according to a distinction already explained. **For the defendant, the form generally is nil capiat.**[4]

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4. Of the form of entry, after judgment upon issues, both in *law* and *fact*, and also after judgment by *default*, the following are examples:

Upon judgment in most personal and mixed actions,

"ENTRY OF JUDGMENT.

For the defendant, upon the issue in law.

(*After the entry of the issue, the proceedings are to be continued on the roll as follows*):

At which day, before our said lord the king, at Westminster, come the parties aforesaid, by their respective attorneys aforesaid. Whereupon, all and singular the premises being seen, and by the court of our said lord the king, now here, fully understood, and mature deliberation being thereupon had, it appears to the said court here that the replication aforesaid, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said *A. B.* to have or maintain his aforesaid action against the said *C. D.*

Therefore it is considered that the said *A. B.* take nothing by his said writ, but that he and his pledges to prosecute be in mercy, and that the said *C. D.* do go thereof without day, &c. And it is further considered by his majesty's court here, that the said *C. D.* do recover against the said *A. B.* —— pounds, for his costs and charges by him laid out about his defense in this behalf, by the court of our said lord the king now here adjudged to the said *C. D.*, and with his assent, according to the form of the statute in such case made and provided; and that the said *C. D.* have execution thereof, &c."

"ENTRY OF JUDGMENT.

For the plaintiff, upon the issue in fact, after trial by jury in London.

(*After the entry of the issue, the proceedings are to be continued on the roll, as follows*):

Afterwards the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our said lord the king, at Westminster, until ———, wheresoever our said lord the king shall then be in England, unless the right honorable Sir Charles Abbott, knight, his majesty's chief justice, assigned to hold pleas in the court of our said lord the king, before the king himself, shall first come on ———, the —— day of ———, at the Guildhall of the city of London, according to the form of the statute in such case made and provided, by reason of the default of the jurors, because none of them did appear. At which day, before our said lord the king, at Westminster, aforesaid. And the said chief justice, before whom the said issue was tried, hath sent hither his record had before him, in these words: to wit, afterwards, that is to say, on the day and at the place within contained, before the right honorable Sir Charles Abbott, the chief justice within mentioned (&c., *as in the postea, supra, to the words "forty shillings"*). Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* the damages, costs, and charges, by the said jury in form aforesaid assessed, and also —— pounds for his said lord the king now here adjudged, costs and charges, by the court of our of increase to the said *A. B.*, and with his assent; which said damages, costs, and charges in the whole amount to ——pounds; and the said *C. D.* in mercy, &c."

The literature on the law of judgments is voluminous. See Freeman on Judgments; Black on Judgments and other works mentioned in Bender's Law Book Catalogue, p. 59.

whether upon issue or by default, confession, etc., it will be observed that **it forms part of the adjudication that the plaintiff or defendant recover his costs** of suit or defence, which costs are **taxed** by an officer of the court at the time when the judgment is given.

Judgments, like the pleadings, were formerly pronounced in open court, and are still always supposed to be so; and they are consequently always considered as taking place in *term time*. [144] But by a relaxation of practice, **there is now in general, except in the case of an issue in law, no actual delivery of judgment, either in court or elsewhere.** The plaintiff or defendant, when the cause is in such a state that by the course of practice he is entitled to judgment, obtains the signature or allowance of the proper officer of the court, expressing generally that judgment is given in his favor; and this is called **signing judgment**, and stands in the place of its actual delivery by the judges themselves. And though supposed to be prouounced during *term*, judgments are frequently signed in time of *vacation*.[5] [145]

Regularly, the next proceeding is to enter the judgment on record. Where it has been signed after *trial* or *demurrer*, it will be remembered that the proceedings up to the time of issue and the award of *venire*, or the continuance by *curia advisari vult*, have already been recorded. It will remain, however, to enter the subsequent proceedings to the judgment inclusive, which is called **entering the judgment.** This is done by drawing them up with continuances, etc., on the same roll on which the issue was entered, by way of continuation, or further narrative, of the proceedings there already recorded; and the judgment is entered in such form as the attorney for the successful party conceives to be legally appropriate to the particular case, supposing that it were actually pronounced by the court. The roll, when complete by the entry of final judgment, is no longer called the issue roll, but has the name of the **judgment roll**, and

5. If not stayed by order of court, on motion for a new trial, etc., judgment is regularly entered up in the record book of the court, which is signed by the judge.

is deposited and filed of record in the treasury of the court.[6] It is believed, however, that this whole proceeding of entering the judgment on record is in practice usually *neglected*.

When judgment is signed, not after trial or demurrer, but as by default, confession, etc., there having been no issue roll yet made up, the whole proceedings, to the judgment inclusive, are to be entered for the first time on record. [146] This is accordingly done by the attorney upon a parchment roll, and upon the same principles as to the form of entry, that have been already stated with respect to recording the issue and judgment thereon.

Upon judgment, the successful party is in general entitled to execution, to put in force the sentence that the law has given. [150] For this purpose he sues out a writ, addressed to the sheriff, commanding him, according to the nature of the case, either to give the plaintiff possession of the lands, or to enforce the delivery of the chattel which was the subject of the action, or to levy for the plaintiff the debt or damages and costs recovered, or to levy for the defendant his costs, and that either upon the body of the opposite party, his lands, or goods, or in some cases upon his body, lands, and goods; the extent and manner of the execution directed always depending upon the nature of the judgment. **Like the judgment, writs of execution are supposed to be actually awarded by the judges in court, but no such award is in general actually made.** The attorney, after signing final judgment, sues out of the proper office a writ of execution in the form to which he conceives he would be entitled upon such judgment *as he has entered,* if such entry has been actually made, and if not made, then upon such *as he thinks he is entitled to enter;* and he does this, of course, upon peril that if he takes a wrong execution, the proceeding will be illegal and void, and the opposite party entitled to redress. [151]

After final judgment is signed, the unsuccessful party

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6. The original process with the return and pleadings on file, the verdict, judgment, etc., entered on the record book are with us parts of the record without enrollment. The file number on papers which are parts of the record, are also part of the record.

may bring a writ of error, and this, if obtained and *allowed* before execution, suspends (generally speaking) the latter proceeding till the former is determined.[7] **A writ of error, like an original writ, is sued out of chancery, directed to the judges of the court in which judgment was given, and commanding them, in some cases, themselves to examine the record, in others, to send it to another court of appellate jurisdiction to be examined,** in order that some alleged error in the proceedings may be corrected. The first form of writ, called a writ of error **coram nobis** [or *vobis*], is where the alleged error consists of **matter of fact**; the second, called a **writ of error generally,** where it consists of **matter of law.**

When a writ of error is obtained, the whole proceedings, to final judgment inclusive, are then always actually entered (if this has not before been done) on record; and the object of the writ of error is to reverse the judgment for some *error* of *fact* or *law* that is supposed to exist in the proceedings *as so recorded.* [152]

There are certain facts which affect the validity and regularity of the legal decision itself; such as the defendant having, while *under age,* appeared in suit by *attorney* and not by *guardian,* or the plaintiff or defendant having been a *married woman* when the suit was commenced. Such facts as these, however late discovered and alleged, are **errors in fact,** and sufficient to traverse the judgment upon writ of error. [153] **To such cases the writ of error coram nobis applies;** "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment."[8]

But the most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake in law. This may be by having *wrongly decided an issue in law* brought before them by demurrer; but it

7. Whether the writ of error operates as a *supersedeas*, depends on the rules and practice of the court. See local statutes and books on practice; Wills' Gould's Plead., 113, note.

8. See Wills' Gould's Plead., 113-116. This writ is used in some states and in others is abolished and relief afforded by motion.

may also happen in other ways. As formerly stated, the judgment will in general follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that **the judges are, in contemplation of law, bound, before in any case they give judgment, to examine the whole record, and then to adjudge either for the plaintiff or defendant, according to the legal right as it may on the whole appear,** notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties; and this because the pleader may, from misapprehension, have passed by a material question of law without taking issue upon it. **Therefore, whenever, upon examination of the whole record, right appears on the whole not to have been done, and judgment appears to have been given for one of the parties when it should have been given for the other, this will be error in law.** [154] And it will be equally error whether the question was raised on *demurrer*, or the issue was an issue in *fact*, or there was *no issue;* judgment having been taken by default, confession, etc. In all these cases, indeed, except the first, the judges have *really* committed no error; for it may be collected from preceding explanations that no record, or even copy, of the proceedings is actually brought before them, except upon demurrer; but with respect to a writ of error, the effect is the same as if the proceedings had all actually taken place and been recorded in open court, according to the fiction and supposition in law. So, on the same principle, there will be error in law if *judgment has been entered in a wrong form,* inappropriate to the case; although, as we have seen, the judges have in practice nothing to do with the entry on the roll. But on the other hand, **nothing will be error in law that does not appear on the face of the record;** for matters not so appearing are not supposed to have entered into the consideration of the judges.[9] **Upon error in law, the remedy is not by writ of error coram nobis** (for that would be

9. That is, the common law record or proceedings incorporated into the record by a bill of exceptions.

merely to make the same judges reconsider their own judgment), but by a writ of error, requiring the record to be sent into some other court of appellate jurisdiction, that the error may be there corrected, and called **a writ of error generally. Such a writ of error cannot be supported unless the error in law be of a substantial kind.** [155] For as by the effect of the statutes of amendments and joefails, errors of *mere form* are no ground for *arresting the judgment,* so by the effect of the same statutes, such objections are now insufficient to found a *writ of error,* though at common law the case is otherwise.[1]

1. See, generally, Wills' Gould's Plead., 112-118 and notes.

CHAPTER II.

OF THE PRINCIPAL RULES OF PLEADING.

The chief objects of pleading are these, — that the parties be brought to issue, and that the issue so produced be material, single, and certain in its quality. [168] In addition to these, however, the system of pleading has always pursued those general objects, also, which every enlightened plan of judicature professes to regard, — **the avoidance of obscurity** and **confusion**, of **prolixity** and **delay**. Accordingly, the whole science of pleading, when carefully analyzed, will be found to reduce itself to **certain principal or primary rules**, the most of which tend to one or other of the objects above enumerated, and were apparently devised in reference to those objects; while the remainder are of an anamalous description, and appear to belong to other miscellaneous principles. [169] **This chapter will therefore treat,—**

I. Of rules which tend simply to **the production of an issue.**

II. Of rules which tend to secure the **materiality** of an issue.

III. Of rules which tend to produce **singleness** or unity in the issue.

IV. Of rules which tend to produce **certainty** or particularity in the issue.

V. Of rules which tend to prevent **obscurity** and **confusion** in pleading.

VI. Of rules which tend to prevent **prolixity** and **delay** in pleading.

VII. Of certain **miscellaneous** rules.

SECTION I.

OF RULES WHICH TEND SIMPLY TO THE PRODUCTION OF AN ISSUE.[1] [170]

The process or system of allegation by which the parties are brought to issue resolves itself into the following **fundamental principles**: first, **that after the declaration the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance**; secondly, **that, upon a traverse, issue must be tendered**; lastly, **that the issue, when well tendered, must be accepted.** Either, by virtue of the first rule, a demurrer takes place, which is a tender of an issue in law; or, by the joint operation of the two first, the tender of an issue in fact; and then, by the last of these rules, the issue so tendered, whether in fact or in law, is accepted and becomes finally complete. It is by these rules, therefore, that the production of an issue is effected, and these will consequently form the subject of the following section.

RULE I.

AFTER THE DECLARATION, THE PARTIES MUST AT EACH STAGE DEMUR, OR PLEAD BY WAY OF TRAVERSE, OR BY WAY OF CONFESSION AND AVOIDANCE.

1. **The party must demur or plead.** [171] If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary: in the former case, as by confession; in the latter, by *non pros.* or *nil dicit.*

2. **If the party pleads, it must either be by way of traverse, or of confession and avoidance.** If his pleading

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1. The student's attention is here called to a little book on the philosophy of pleading, entitled "Pleading in Civil Actions," by Hugh Davey Evans, LL. D. This is not a treatise on the rules of pleading but an excellent discussion of the reason of some of the principal rules. It deserves to be better known than it appears to be.

amount to neither of these modes of answer, it is open to demurrer on that ground.

For the complete illustration of the rule, it will be necessary to consider at large the doctrines that relate both to *demurrers* and to *pleadings*.

I. **Of demurrer.**[2]

1. **Of the nature and properties of a demurrer.** [172]

A demurrer may be for insufficiency either in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is **essentially insufficient**, or on the ground that it is stated in an **inartificial manner**; for " the law requires in every plea " (and the observation equally applies to all other pleadings) " two things: the one, that it be in matter sufficient; the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer." And we may here take occasion to remark that **a violation of any of the rules of pleading that will be hereafter stated is, in general, ground for demurrer**; and such fault occasionally amounts to matter of *substance*, but usually to matter of *form* only.

A demurrer, as in its *nature*, so also in its *form*, is of two kinds: it is either *general* or *special*. **A general demurrer excepts to the sufficiency in general terms**, without showing specifically the nature of the objection; **a special demurrer adds to this a specification of the particular ground of exception. A general demurrer is sufficient, where the objection is on matter of substance** [173]; **a special demurrer is necessary where it turns on matter of form only** [27 Eliz. c. 5, and 4 Anne, c. 16],[3]— that is, where, not-

2. See generally, Wills' Gould's Plead., 100, 570.

3. By two statutes, 27 Elizabeth, c. 5, and 4 Anne, c. 16, passed in a view to the discouragement of merely formal objections, it is provided, in nearly the same terms, that the judges " shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same;" the latter statute adding this proviso: " So as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause."

withstanding such objection, enough appears to entitle the opposing party to judgment as far as relates to the merits of the cause.

But on the other hand, **under a special demurrer, the party may on the argument not only take advantage of the particular faults which his demurrer specifies, but also of all such objections in substance,** or regarding the "very right of the cause" (as the statutes express it), as do not require under those statutes to be particularly set down. [174] It follows, therefore, that **unless the objection be clearly of this substantial kind, it is the safer course in all cases to demur specially.** With respect to the **degree of particularity with which, under these statutes, the special demurrer must assign the ground of objection,** it is not sufficient to object, in general terms, that the pleading is "uncertain, defective, informal," or the like, but it is **necessary to show in what respect uncertain, defective, or informal.**

With respect to the effect of a demurrer, it is first a rule that **a demurrer admits all such matters of fact as are sufficiently pleaded.**[4] [175] And therefore the only question for the court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged. The rule is, however, laid down, with this **qualification, that the matter of fact be sufficiently pleaded.** For if it be not pleaded in a formal and sufficient manner, it is said that a demurrer in this case is no admission of the fact. But this is to be understood as subject to the alterations that have been introduced into the law of demurrer by the statutes already mentioned; and, therefore, **if the demurrer be general instead of special, it amounts, as it is said, to a confession, though the matter be informally pleaded.**

Again, it is a rule that, **on demurrer, the court will con-**

4. See Wills' Gould's Plead., 572, 573 and notes, as to what allegations are not admitted by a demurrer, e. g., surplusage, opinions, conclusions, matters on information and belief, etc. The facts well pleaded are admitted for the sole purpose of determining their legal sufficiency. Id., 573, note, and cases cited.

sider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. [176] Thus, on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the *plea,* they will give judgment, not for the defendant, but the plaintiff, provided the *declaration* be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant.

This rule is, however, subject to the following **exceptions:** — First, **if the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster,** without regard to any defect in the declaration. Secondly, **though on the whole record the right may appear to be with the plaintiff, the court will not adjudge in favor of such right, unless the plaintiff have himself put his action upon that ground.** Thirdly, **if a demurrer to the declaration be too large,** as it is called, that is, be pointed to all the counts of the declaration in a case where one of them only is defective, **the court will give judgment for the plaintiff generally, notwithstanding the defective count.** Lastly, **the court, in examining the whole record, to adjudge according to the apparent right, will consider only the right in matter of substance, and not in respect of mere form,** such as should have been the subject of special demurrer.[5] [177]

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5. "The court upon the argument of a demurrer (except in the case of a demurrer to a plea in abatement) will look over the whole record, and consider as well the previous pleadings as the particular pleading demurred to, and give judgment for the party who on the whole appears to be entitled to it. But a plaintiff is not entitled to recover in respect of a cause of action which is not stated in his declaration and is disclosed only in the defendant's plea. Marsh v. Bulteel, 5 B. & Ald. 507.

When a pleading is clearly bad in substance, it is generally advisable to demur to it, as the judgment upon the demurrer (except a judgment for the plaintiff on a demurrer to a plea in abatement) will be final, and determine the cause, or the part of it to which the demurrer relates, in the simplest and cheapest manner; and the demurrer will prevent the possibility of the defect being aided by pleading over or by verdict.

But although a party may elect not to demur to a defective pleading, he may be able to object to it at a later stage, either upon a subsequent

2. **The effect of pleading over without demurrer.** It is the effect of a demurrer to admit the truth of all matters of fact sufficiently pleaded on the other side; but **it cannot be said e converso, that it is the effect of a pleading to admit the sufficiency in law of the facts adversely alleged.**[6] [178] In many cases, a party, though he has pleaded over without demurring, may nevertheless afterwards avail himself of an insufficiency in the pleading of his adversary. But this is not universally true. For first, **faults in the pleading are in some cases aided by pleading over.** Thus in an action of trespass for taking a hook, where the plaintiff omitted to allege in the declaration that it was *his* hook, or even that it was in his possession, and the de-

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demurrer, or by motion in arrest of judgment, or for judgment *non obstante veredicto*, or by error.

When a pleading states a deed or an agreement or other written document according to its supposed legal effect, and the opposite party admits the instrument in fact, but disputes the construction put upon it, it is often convenient for the latter to set out the writing verbatim in his pleading in order that the party relying on the document may be compelled to demur, and so raise the question as to the legal construction upon the demurrer.

At common law a party has the alternative either to plead or to demur to the pleading of his opponent, but is not at liberty both to plead and demur to the same pleading. Bayley v. Baker, 1 Dowl. N. S. 891.

The demurrer should be confined to that part of a declaration which is insufficient. If there are several counts in the same declaration, some good and some bad, and the defendant demurs generally to the whole declaration, the plaintiff shall have judgment for so much as is good. 1 Wms. Saund., 6th Ed., 285 b; 1 Wms. notes to Saund., 432, 433; Briscoe v. Hill, 10 M. & W. 735. So where a declaration assigned two breaches, and one of them only was well assigned, but the demurrer went to the whole declaration, the judgment for the plaintiff was confined to that breach which was well assigned. Slade v. Hawley, 13 M. & W. 757.

Upon a demurrer to one count or part of a count the plaintiff may enter a *nolle prosequi* as to the causes of action to which the demurrer is pleaded (Milliken v. Fox, 1 B. & P. 157; Bertram v. Gordon, 6 Taunt. 445), or to the residue of the declaration. But the defendant cannot enter a *nolle prosequi* as to part of the matter demurred to, where by so doing he would take away the grounds of demurrer; as in the case of a demurrer to the whole declaration for a misjoinder of counts, a *nolle prosequi* cannot be entered as to one of the counts. Drummond v. Dorant, 4 T. R. 360; Butler v. Mapp, 10 Bing. 391." Wills' Gould's Plead., 573, note.

6. Hopper v. Covington, 118 U. S. 148.

fendant pleaded a matter in confession and avoidance, justifying his taking the hook *out of the plaintiff's hand,* the court, on motion in arrest of judgment, held, that as the plea itself showed that the hook was in the possession of the plaintiff, the objection, which would otherwise have been fatal, was cured.[7] [179] And **with respect to all objections of form, "if a man pleads over, he shall never take advantage of any slip committed in the pleading of the other side which he could not take advantage of upon a general demurrer."**[8]

Again, **faults in the pleading are in some cases aided by a verdict.**[9] The extent and principle of this rule of *aider by verdict* is thus explained in a modern decision of the Court of King's Bench: **"Where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair, and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial."**[1] [180] In entire accordance with this are the observations of Mr. Serjeant Williams: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to

7. Glasscock v. Morgan, Sid., 184, cited Bac. Ab., Trespass, p. 603.

8. Per Holt, C. J.; Anon., 2 Salk. 519; Bac. Ab., Pleas, etc., 322.

9. Com. Dig., Pleader, C. 87; 1 Saund. 228, n. 1; Weston v. Mason, 3 Burr. 1725; Spieres v. Parker, 1 T. R. 141; Johnstone v. Sutton, *ibid,* 545; Nerot v. Wallace, 3 T. R. 25; Jackson v. Pesked, 1 M. & S. 234; Campbell v. Lewis, 3 Barn. & Ald. 392; Keyworth v. Hill, *ibid,* 685; Pippit v. Hearn, 5 Barn. & Ald. 634; Lord Huntingtower v. Gardiner, 1 Barn. & Cres. 297; Price v. Seaman, 4 Barn. & Cres. 525.

1. Jackson v. Pesked, 1 M. & S. 234.

be presumed that either the judge would direct the jury to give, or the jury would have given the verdict such defect, imperfection, or omission is cured by the verdict."[2] [181] It is, however, only where such "fair and reasonable intendment" can be applied, that a verdict will cure the objection; and therefore, **if a necessary allegation be altogether omitted in the pleading, or if the pleading contain matter adverse to the right of the party by whom it is alleged, and so clearly expressed that no reasonable construction can alter its meaning, a verdict will not aid.**[3]

Lastly, **at certain stages of the cause, all objections of form are cured by the different statutes of jeofails and amendments;** the cumulative effect of which is, to provide that neither after verdict, nor judgment by confession, *nil dicit,* or *non sum informatus,* can the judgment be arrested or reversed by any objection of that kind. [182]

3. **Considerations by which the pleader ought to be governed in making his election to demur or to plead.**

He is first to **consider whether the declaration or other pleading opposed to him is sufficient in substance and in form to put him to his answer.** If sufficient in both, he has no course but to plead. On the other hand, if insufficient in either, he has *ground* for demurrer; but **whether he should demur or not is a question of expediency,** to be determined upon the following views: **If the pleading be insufficient in form, he is to consider whether it is worth while to take the objection,** recollecting the indulgence which the law allows in the way of *amendment,* but also bearing in mind that the objection, if not taken, will be aided by pleading over, or, after pleading over, by the verdict, or by the status of amendments and jeofails. [183] And if he chooses to demur, he must take care to demur specially, lest upon general demurrer he should be held excluded from the objection. On the other hand, **supposing an insufficiency in substance, he is to consider whether that insufficiency be in the case**

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2. 1 Saund. 228, n. 1.
3. Jackson v. Pesked, 1 M. & S. 234; Nerot v. Wallace, 3 T. R. 25; Weston v. Mason, 3 Burr. 1725.

itself, or in the manner of statement;[4] for on the latter supposition, it might be removed by an amendment; and it may, therefore, not be worth while to demur. And whether it be such as an amendment would remove or not, a further question will arise, whether it be not expedient to pass by the objection for the present and plead over. For a party by this means often obtains the advantage of contesting with his adversary, in the first instance, by an issue in fact, and of **afterwards urging the objection in law by motion in arrest of judgment or writ of error.**[5] This double aim, however, is not always advisable; for though none but *formal* objections are cured by the statutes of jeofails and amendments, **there are some defects of substance as well as form which are aided by pleading over, or by a verdict**; and, therefore, unless the fault be clearly of a kind not to be so aided, a demurrer is the only mode of objection that can be relied upon. [184] **The additional delay and expense of a trial** is also sometimes a material reason for proceeding in the regular way of demurrer, and not waiting to move in arrest of judgment, or to bring a writ of error.

II. **Of Pleadings.**

1. **Of the nature and properties of traverses.** [185]

The most ordinary kind of traverse is that which may be called **a common traverse.** It **consists of a tender of issue;** that is, of a denial, accompanied by a formal offer of the point denied, for decision, and **the denial that it makes is by way of express contradiction, in terms of the allegation**

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4. "If a declaration does not set forth any known cause of action, even imperfectly, a demurrer assigning that it does not state any legal cause of action is sufficient. The cause of demurrer could not well be more specifically assigned." Johnson v. Reed, 136 Mass. 421; Wills' Gould's Plead., 572, note.

5. "When the matter in fact will clearly serve for your client, although your opinion is that the plaintiff hath no cause of action, yet take heed that you do not hazard the matter upon a demurrer, in which, upon the pleading and otherwise, more will perhaps arise than you thought of; but first take advantage of the matters of fact, and leave matters in law, which always arise upon the matters in fact, *ad ultimum*, and never at first demur in law when, after trial of the matters in fact, the matters in law will be saved to you." Lord Cromwell's Case, 4 Rep. 14 a.

traversed. Common traverses, if opposed to a precedent negative allegation, will, of course, be in the *affirmative*.[6]

In most of the usual actions there is an appropriate plea, fixed by ancient usage, as the proper method of traversing the declaration, in cases where the defendant means to deny the whole or the principal part of its allegations.[7] [186] This form of plea or traverse is called the **general issue** in that action. Not only in extent or comprehensiveness, but in point of form also, it differs somewhat from a common traverse; for though, like that, it *tenders issue,* yet in several instances it does not contradict *in terms of the allegation traversed,* but in a more general form of expression. [187]

In the writ of right and in dower, there seems to be, properly speaking, *no* general issue.

In formedon, the general issue is called the plea of **ne dona pas, or non dedit.**

In quare impedit, the general issue is called **ne disturba pas.**

In debt on bond or other specialty, the general issue is called the plea of **non est factum,** and is as follows: —

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6. Example:

"PLEA OF THE STATUTE OF LIMITATIONS

In assumpsit.

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, because, he says, that he, the said *C. D.*, did not, at any time within six years next before the commencement of this suit, undertake or promise, in manner and form as the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment, if the said *A. B.* ought to have or maintain his aforesaid action against him, &c."

"REPLICATION.

And the said *A. B.* says, that, by reason of anything in the said plea alleged, he ought not be barred from having and maintaining his aforesaid action against the said *C. D.*, because, he says, that the said *C. D.* did, within six years next before the commencement of this suit, undertake and promise, in manner and form as he, the said *A. B.*, hath above complained; and this he prays, may be inquired of by the country."

Pleadings are always *entitled* at the commencement, *i. e.*, have a superscription of the court and term, as in the examples in the first chapter; but in this, and all subsequent examples, the title is, for the sake of brevity, omitted.

7. See Wills' Gould's Plead., 477, 479, 499 and notes.

And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that the said supposed writing obligatory (*or "indenture," or "articles of agreement," according to the subject of the action*) is not his deed; and of this he puts himself upon the country. [188]

In debt on simple contract, the general issue is called the plea of **nil debet;**[8] and is thus: —

And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said *A B* hath above complained; and of this the said *C D* puts himself upon the country.

In covenant, the general issue is **non est factum,** and its form is similar to that in debt on specialty.

In detinue, the general issue is called the plea of **non detinet,** and is as follows: —

And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not detain the said goods and chattels (*or "deeds and writings," according to the subject of the action*) in the said declaration specified, or any part thereof, in manner and form as the said *A B* hath above complained; and of this the said *C D* puts himself upon the country. [189]

In trespass, the general issue is called the plea of **not guilty,** and is as follows: —

And the said *C D*, by ———, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said *A B* hath above complained; and of this the said *C D* puts himself upon the country.

In trespass on the case (in the species of **assumpsit**), the general issue is called the plea of **non assumpsit,** and is as follows: —

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8. *Nil debet* is the proper form of the general issue, not only in debt on simple contract, but in all other actions of debt not founded on a deed or specialty. And an action is not considered as founded on a deed or specialty, so as to require a plea of *non est factum*, if the deed be mentioned in the declaration only as introductory to some other main cause of action. Therefore *nil debet* is a good plea in debt for rent upon an indenture, or in debt for an escape, or in debt upon a devastavit. 1 Tidd, 701, 8th Ed.

And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise, in manner or form as the said *A B* hath above complained; and of this the said *C D* puts himself upon the country.

In trespass on the case, in general, the general issue is **not guilty,** and is thus: —

And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge, in manner and form as the said *A B* hath above complained; and of this tht said *C D* puts himself upon the country.

In replevin, the general issue is called the plea of **non cepit,** and is as follows:—

And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the said cattle (*or "goods and chattels," according to the subject of the action*) in the said declaration mentioned, or any of them, in manner and form as the said *A B* hath above complained; and of this the said *C D* puts himself upon the country. [190]

A very important effect attends the adoption of the general issue, viz., that by tendering the issue on the declaration, and thus closing the process of the pleading at so early a stage, it throws out of use, wherever it occurs, a great many rules of pleading applying exclusively to the remoter allegations.

In debt on specialty and in covenant, the general issue, non est factum, denies that the deed mentioned in the declaration is the deed of the defendant. [191] **Under this, the defendant at the trial may contend either that he never executed such deed as alleged, or that it is absolutely void in law:** for example, on the ground that the alleged obligor or covenantor was at the time of execution a married woman or a lunatic, etc. **But if the defendant's case consist of anything but a denial of the execution of such deed as alleged, or some facts showing its absolute invalidity, the plea of non est factum will be improper.**[9] [192] The rule is, that

9. If the statement of the deed in the declaration materially varies from the tenor of the deed itself, the plea of *non est factum* will of course be as applicable as where no deed has been executed by the defendant; for in

while matters which make a deed absolutely void may be given in evidence under *non est factum*, those which make it voidable only must be specially pleaded. And it seems that, in general, objections to the legality of the consideration on which a deed was founded are referable to the latter class. And it is a general rule that any illegality arising from the prohibition of *an act of Parliament*, as in the case of usury or gaming, is matter for special plea, and is not evidence under *non est factum*,— a rule apparently founded on the same principle. [193]

In debt on simple contract, the declaration alleges that the defendant was indebted to the plaintiff on some consideration, e. g., for goods sold and delivered. **The general issue alleges "that he does not owe the sum of money," etc., and is adapted to any kind of defence that tends to deny an existing debt**; and therefore not only to a defence consisting in a denial of the sale and delivery, but to those of *release, satisfaction, arbitrament,* and a multitude of others, to which a general issue of a narrower kind (for example, that of *non est factum*) would, in its appropriate actions, be inapplicable. [194] In short, **there is hardly any matter of defence to an action of debt to which the plea of nil debet may not be applied**, because almost all defences resolve themselves into a denial *of the debt*.[1]

In detinue, the declaration states that the defendant detains certain goods of the plaintiff; **the general issue alleges that he "does not detain the said goods in the said declaration specified," etc. This will apply**

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either case the deed, as *alleged*, is not his. So, if the instrument was delivered as an *escrow*, this is evidence under *non est factum* (1 Tidd, 701, 8th Ed.), because it shows the invalidity of the instrument as a *deed*. But it seems that its delivery as an escrow may be also specially pleaded. Murray v. Earl of Stair, 2 Barn. & Cres. 82; 2 Chitty, 462, n. *t*, 1st Ed.

1. It was even holden, per Holt, C. J., that as the plea is in the present tense, the defendant may give in evidence the *statute of limitations*. Draper v. Glassop, 1 Ld. Ray. 153; Lee v. Clarke, 2 East. 336. Per Lawrence, J. Qu. tamen., see 1 Saund. 283, n. 2, 2 Saund. 62 c, n. 6. But under this plea, defendant cannot give in evidence a *tender*, nor (without notice) a *set-off;* nor (in an action for rent on indenture), that the plaintiff *had nothing in the tenements;* nor (in debt, qui tam) *a former recovery* against him for the same cause by another person. 1 Tidd, 700, 8th Ed.

either to a case where the defendant means to deny that he detains the goods mentioned, or to a case where he means to deny that the goods so detained are the property of the plaintiff.

In trespass, the general issue, not guilty, evidently amounts to a denial of the trespasses alleged, and no more. [195] Therefore, if in trespass for assault and battery the case be that the defendant has *not* assaulted or beat the plaintiff, it will be proper that he should plead the general issue; but if his case be of any other description, the plea will be inapplicable. **So in trespass quare clausum fregit, or for taking the plaintiff's goods,** if the defendant did not, in fact, break and enter the close in question or take the goods, the general issue, "not guilty," will be proper. It will also be applicable if he *did* break and enter the close, but it was not *in the possession of the plaintiff,* or not *lawfully in his possession, as against the better title of the defendant.* So it will be applicable if he did take the goods, but they did not *belong to the plaintiff.* But if the defence be of any other kind, the general issue will not apply. [196]

The declaration in assumpsit states that the defendant, upon a certain consideration therein set forth, made a certain promise to the plaintiff. **The general issue states that the defendant "did not promise and undertake in manner and form," etc.** This, at first sight, would appear to put in issue merely the fact of his having made a promise such as alleged. A much wider effect, however, belongs in practice to this plea, and **by a relaxation of practice, in all actions of assumpsit, without distinction, the defendant is under the general issue, permitted not only to contend that no promise was made, or to show facts impeaching the validity of the promise, but** (with some few exceptions) **to prove any matter of defence whatever which tends to deny his debt or liability;** for example, a release or performance.[2] [198]

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2. He cannot, however, give in evidence, a *tender, bankruptcy of defendant,* the *statute of limitations, a discharge under the insolvent act,* nor (in some cases) a defence under the *court of conscience acts.* Nor is a *set-off* evidence under *non assumpsit,* unless notice of set-off be given with the plea. 1 Chitty, 473, 1st Ed.; 1 Tidd, 700, 8th ed.

The declaration in the action of trespass on the case in general, sets forth specifically the circumstances which form the subject of complaint. [199] **The general issue, not guilty, is a mere traverse or denial of the facts so alleged,** and therefore, on principle, should be applied only to cases in which the defence rests on such denial. **But here a relaxation has taken place similar to that which prevails in assumpsit; for under this plea a defendant is permitted not only to contest the truth of the declaration,** but, with certain exceptions, **to prove any matter of defence that tends to show that the plaintiff has no right of action,** though such matters be in confession and avoidance of the declaration; as, for example, a release given or satisfaction made.[3] [200]

Although, however, in assumpsit and trespass on the case in general, the defendant is allowed, under the general issue, to give in evidence matters which do not fall within the strict principles of that plea, and among these, matters in confession and avoidance, with respect to matters of this latter description, **he is in no case obliged to take that course,** but may still bring forward, by way of special plea in confession and avoidance, all such allegations as properly fall within the principle of such pleadings.[4]

Lastly, **the general issue, non cepit, in replevin, applies to the case where the defendant has not in fact taken the cattle or goods, or where he did not take them or have them,**

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3. In an action for libel or words of slander he cannot give in evidence the *truth* of the charges, but must plead it specially; nor *retaking on fresh pursuit,* in an action for escape; nor in any action on the case, the *statute of limitations.* 1 Tidd, 702, 8th Ed.; 1 Chitty, 487, 1st Ed.

4. Upon this principle the defendane may plead specially, not only a *release, performance, payment, accord and satisfaction,* or other matter in *discharge,* but any matter also which tends to show the contract *void* or *voidable in point of law,* while it admits it to have been made in fact, such as *infancy, lunacy, coverture, duress, usury, gaming,* or the *statute of frauds.* All these, however, are evidence under the general issue.

The chief advantage of pleading specially is, that it obliges the plaintiff to *reply;* in doing which, he is confined (as will be shown hereafter) to a single answer. This often puts him to great disadvantage, for he may have several answers to the defendant's case; and, if the general issue be pleaded, may avail himself of all.

in the place mentioned in the declaration, [201] the *place* being a material point in this action.[5] [202]

Pleas other than general issues are ordinarily distinguished from them by the appellation of special pleas; and when resort is had to the latter kind, the party is said to plead *specially,* in opposition to pleading the *general issue.* So the *issues* produced upon special pleas are sometimes described in the books as **special issues,** by way of distinction from the others, which were called *general issues.*

There is another species of traverse which varies from the common form, and which, though confined to particular actions and to a particular stage of the pleading, is of frequent occurrence. [203] It is the **traverse de injuria sua propria, absque tali causa,** or (as it is more compendiously called the traverse *de injuria.*[6] **It always tenders issue;** but on the other hand differs, like many of the general issues, from the common form of a traverse, by **denying in general and summary terms, and not in the words of the allegation traversed.** The following is an example: —

PLEA OF SON ASSAULT DEMESNE,
IN TRESPASS, FOR ASSAULT AND BATTERY.

And for a further plea in this behalf, as to the said assaulting, beating, wounding, and ill-treating, in the said declaration mentioned, the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the staute in such case made and provided, says that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because, he says, that the said *A B*, just before the said time, when, etc., to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, with force and arms, made an assault upon him, the said *C D*, and would then and there have beaten and ill-treated him, the said *C D*, if he had not immediately defended himself against the said *A B;* wherefore the said *C D* did then and there defend himself against the said *A B*, as he lawfully might, for the cause aforesaid, and in so doing did necessarily and unavoidably a little beat, wound, and ill-treat the said *A B*, doing no unnecessary damage to the said *A B* on the occasion aforesaid; and so the said *C D* saith, that if any hurt or damage then and there happened to the said *A B*, the same

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5. See, as to the general issue in the several common law actions, Wills' Gould's Plead. (6th Ed.), 10, 22, 26, 29, 34, 43, 53, 477, 478, 483, 485, 495-507, 520.

6. See Wills' Gould's Plead., 538 *et seq.*

was occasioned by the said assault so made by the said *A B* on him, the said *C D*, and in the necessary defence of himself the said *C D*, against the said *A B*, which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained; and this the said *C D* is ready to verify. [204] Wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him.

REPLICATION.

And as to the said plea by the said defendant last above pleaded, in bar to the said several trespasses in the introductory part of that plea mentioned, the said *A B* says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said *C D*, because, he says, that the said *C D*, at the said time when, etc., *of his own wrong, and without the cause in his said last-mentioned plea alleged*, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the said *A B* hath above complained; and this he prays may be inquired of by the country.

This species of traverse occurs in the replication in action of trespass and trespass on the case, but is not used in any other stage of the pleading. In these actions it is **the proper form, when the plea consists merely of matter of excuse.** But when it consists of or comprises matter of *title* or *interest* in the land, etc., or the *commandment* of another, or *authority of law,* or *authority in fact,* derived from the opposite party, or matter of *record,*— in any of these cases, the replication *de injuria* is generally improper, and the traverse of any of these matters should be in the common form; that is, in the words of the allegation traversed. [205]

There is still **another species of traverse,** which differs from the common form, and is known by the denomination of a **special traverse.**[7]

Though formerly in very frequent occurrence, this species has now fallen, in great measure, into disuse. The following is an example of a plea by way of special traverse, to a declaration by the heir of a lessor against the lessee, in an action of covenant for non-payment of rent.

And the said *C D* [the lessee], by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that the said *A B* [the heir of the lessor, *E B*] ought not to have or maintain his aforesaid action against him, because, he says, that the said *E B*, deceased, at the time of the making of the said indenture, was seised in his demesne as

7. See Wills' Gould's Plead., 545.

of freehold, for the term of his natural life, of and in the said demised premises, with the appurtenances, and continued so seised thereof until and at the time of his death; and that, after the making of the said indenture and before the expiration of the said term, to wit, on the —— day of ———, in the year of our Lord ——, at ———, aforesaid the said *E B* died; whereupon the term created by the said indenture wholly ceased and determined: *Without this, that* after the making of the said indenture, the reversion of the said demised premises belonged to the said *E B* and his heirs, in manner and form as the said *A B* hath in his said declaration alleged; and this the said *C D* is ready to verify. Wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action against him. [208]

The substance of this plea is, that the father was seised for life only, and therefore that the term determined at his death; which involves a denial of the allegation in the declaration, that the reversion belonged to the father in fee. The defendant's course was, therefore, to traverse the declaration. But it will be observed that he does not traverse it in the common form. If the *common* traverse were adopted in this case, the plea would be: "And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says that the said *A B* ought not to have or maintain his aforesaid action against him, because, he says, that after the making of the said indenture, the said reversion of the said demised premises did not belong to the said *E B* and his heirs, in manner and form as the said *A B* hath in his said declaration alleged; and of this the said *C D* puts himself upon the country." But instead of this simple denial and tender of issue, the defendant adopts **a special traverse. This first sets forth the new affirmative matter,** that *E B* was seised for life, etc., and **then annexes to this the denial** that the reversion belonged to him and his heirs, by **that peculiar and barbarous formula, "Without this, that,"** etc.; and, lastly, does not (like a common traverse) *tender issue*, but **concludes with the words, "and this the said C D is ready to verify.** [209] **Wherefore he prays judgment,"** etc.; which is called a **cerification and prayer of judgment,** and is the constant conclusion of all pleadings in which issue is not tendered. The affirmative part of the special traverse is called its **inducement,** the negative part is called the **absque hoc,** those being the Latin words formerly used, and from which the modern expression, *without this*, is translated. The different parts and properties here noticed are all essential to **a special traverse,** which **must always thus consist of an inducement** [which does not necessarily consist of *new* affirmative matter], **a denial, and a verification.**

The regular method of pleading in answer to a special traverse, is to tender issue upon it, with a repetition of the allegation traversed. [215] Accordingly, in the first example, issue would be tendered in the replication thus:—

REPLICATION.

TO THE PLEA (p. *208).

And as to the said plea by the said *C D* above pleaded, the said *A B* says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action against the said *C D*, because the said *A B* says, that after the making of the said indenture the reversion of the said demised premises belonged to the said *E B* and his heirs, in manner and form as the said *A B* hath in his said declaration above alleged; and this he prays may be inquired of by the country.

In modern times the special traverse, without an inducement of new matter, has been considered not only as *unnecessary*, but as frequently *improper*. [223] The courts appear to have established in favor of the common plea of traverse, in cases where there is no allegation of new matter, the following rule of distinction: That **where the whole substance of the last pleading is denied, the conclusion must be to the country,**[8] or, in other words, the traverse must be in the common form; *but where one of several facts only is the subject of denial, the conclusion may be either to the country or with a verification;* that is, the traverse may be either common or special, *at the option of the pleader.* The special traverse now rarely occurs in any instance where there is no inducement of new matter, although the denial relate to one out of several facts only. [224] And even though the case be such as would admit of an inducement of new matter explanatory of the denial, the usual course is to omit any such inducement, and to make the denial in an absolute form, with a tender of issue; thus substituting the common for the special formula.[9] [225]

8. Wills' Gould's Plead., 543.

9. For further particulars concerning special traverses, see the unabridged text of Stephens on Pleading; Evans on Pleading, c. 3, § 24; Wills' Gould's Plead., 545; 1 Chitty's Plead., titles, *de injuria*, replication, traverse.

"The late precedents have introduced, in certain cases (as in replications to pleas of *usury*, or other *illegality*), a new species of general or abridged traverse, preceded by a *general* inducement, which denies the plea, in *general* terms, according to an established form, instead of traversing it *specially*, by following the precise terms of it, as was formerly done. This traverse concludes to the country." Wills' Gould's Plead., 539; 2 T. R. 439; 3 ib. 426; 1 Saund. 103, b, n. 3.

It will be proper next to advert to **certain principles which belong to traverses in general.** [231]

The first of these is, that **it is the nature of a traverse to deny the allegation in the manner and form in which it is made,** and therefore to put the opposite party to prove it to be true in manner and form, as well as in general effect. **It is, however, in general, sufficient to prove accurately the substance of the allegation;** and a deviation in point of *mere form, or in matter quite immaterial,* will be disregarded.

The existence of the principle first stated is indicated by the wording of a traverse, which, when in the negative, generally denies the last pleading *modo et forma*, "in manner and form as alleged." [232] This will be found to be the case in all the preceding examples, except in the general issue *non est factum* and the replication *de injuria*, which are almost the only negative traverses that are not pleaded *modo et forma*. These words, however, though usual, are said to be in no case strictly essential, so as to render their omission cause of demurrer.

With respect to all traverses, it is a rule, that a traverse must not be taken upon matter of law.[1] [233] For a denial of the law involved in the precedent pleading is, in other words, an exception to the sufficiency of that pleading in point of law, and is therefore within the scope and proper province of a *demurrer,* and not of a *traverse.* But, on the other hand, **where an allegation is mixed of law and fact, it may be traversed.**[2] [234] For example, in answer to an allegation that a man was "taken out of prison by virtue of a certain writ of habeas corpus," it may be traversed that he was "taken out of prison by virtue of that writ."

The usual form of this traverse is as follows, viz., that "the said bond, promise, etc., was made, for a good and lawful consideration *and not* in pursuance of, or upon, the said corrupt and unlawful agreement, or for the purpose, in the said plea of the said *C. D.* mentioned, in manner and form, etc., and this the said *A. B.* prays may be inquired of by the country. *Vide* 2 T. R. 439; 3 ib. 426; 2 Chitt. Pl. 616.

1. 1 Saund. 23, n. 5; Doct. Pl., 351; Kenicot v. Bogan, Yelv., 200; Priddle and Napper's Case, 11 Rep. 10 b; Richardson v. Mayor of Oxford, 2 H. Bl. 182.

2. 1 Saund. 23, n. 5, and see the instances cited; Bac. Ab., Pleas, etc., p. 380, note b, 5th ed.; Beal v. Simpson, 1 Lord Ray. 412; Grocers' Company v. Archbishop of Canterbury, 3 Wils. 234.

It is also a rule that **a traverse must be taken upon matter not alleged.**[3] [235] There is, however, the following **exception** to this rule, viz., that **a traverse may be taken upon matter which, though not expressly alleged, is necessarily implied.** [236]

Another rule that may be referred to this head, though of a more special and limited application than the former, is the following: that **a party to a deed, who traverses it, must plead non est factum, and should not plead that he did not grant, did not demise, etc.**[4] [237]

A man is sometimes precluded, in law, from alleging or denying a fact in consequence of his own previous act, allegation, or denial to the contrary, and this preclusion is called an estoppel.[5] [238] It may arise either from **matter of record,** from the **deed** of the party, or from **matter in pais,** that is, matter of *fact.*[6] Now it is from this doctrine of estoppel, apparently, that the rule now under consideration as to the mode of traversing deeds has resulted. [239] For though a party against whom a deed is alleged may be allowed, consistently with the doctrine of estoppel, to say *non est factum,* viz., that the deed is not his, he is, on the other hand, precluded by that doctrine from denying its effect or operation; because if allowed to say *non concessit* or *non demisit,* when the instrument purports to grant or demise, he would be permitted to contradict his own deed. Accordingly, it will be found that **in the case of a person not a party, but a stranger to the deed, the rule is reversed, and the form of traverse in that case is non concessit, etc.,** the reason of which seems to be that estoppels do not hold with respect to strangers.

The doctrine of traverse being now discussed,[7] the next subject for consideration is,

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3. 1 Saund. 312 d, n. 4; Doct. Pl., 358; Crosse v. Hunt, Carth. 99; Powers v. Cook, 1 Lord Ray. 63; 1 Salk. 298.

4. Robinson v. Corbett, Lutw. 662; Taylor v. Needham, 2 Taunt. 278.

5. An estoppel is "when a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Co. Litt., 352 a.

6. Co. Litt., 352 a.

7. See, generally, as to traverse, Wills' Gould's Plead., ch. 4.

2. **The nature and properties of pleadings in confession and avoidance.**

First, **with respect to their division.** [240] Of *pleas* in confession and avoidance, **some are distinguished** (in reference to their subject-matter) **as pleas in justification or excuse, others as pleas in discharge.** The effect of the former is to show that the plaintiff never had any right of action, because the act charged was lawful; the effect of the latter, to show that though he had once a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse, the plea of *son assault demesne* is an example; of those in dischcarge, a release. **This division applies to pleas only**; for *replications and other subsequent pleadings* in confession and avoidance are not subject to any such classification.

As to the form of pleadings in confession and avoidance, it will be sufficient to refer the reader to [any book of precedents, *e. g.*, 3 Chitty on Pleading], and to observe that, in common with all pleadings whatever which do not tender issue, **they always conclude with a verification and prayer of judgment.**

With respect to the quality of these pleadings, it is a rule, that **every pleading by way of confession and avoidance must give color.**[8] [241] *Color,* as a term of pleading, sig-

8. See Reg. Plac., 304; Hatton v. Morse, 3 Salk. 273; Hallet v. Byrt, 3 Mod. 252; Holler v. Bush, 1 Salk. 394; 1 Chitty, 498, 1st Ed.

"To give color to the plaintiff, is to assign to him, in the plea, some *colorable* (i. e. *defective*), but *fictitious* title, of which (it being matter of law), the jury is incompetent to judge—in order to justify, in opposition to it, a special statement of the *defendant's* title; so that the question, which is the *better* title of the two, may appear, upon the face of the plea, as a question of law. And thus, by alleging a *fictitious* and *defective* title in the plaintiff, which cannot be traversed, the defendant is enabled to plead specially what, *in fact,* is neither more nor less than the general issue. He may, for example, plead a possessory title in himself, under a feoffment with livery, from A. (which plea would, *by itself,* amount to the general issue), provided he adds, that the plaintiff entered, claiming title under *color* of a certain prior deed of feoffment, *without livery,* by which nothing passed: in which case, the title, alleged in the plaintiff, is clearly defective, at common law."

"If the defendant, when intending to give *color* to the plaintiff, assigns

nifies **an apparent or prima facie right**; and the meaning of the rule, that every pleading in confession and avoidance must give color, is, that it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated. That kind of color, which is a latent quality naturally inherent in the structure of all regular pleadings in confession and avoidance, has been called **implied color**, to distinguish it from another kind, which is, in some instances, formally inserted in the pleading, and is therefore known by the name of **express color.** [245]

It is the latter kind to which the technical term most usually applies; and to this the books refer when color is mentioned *per se*, without the distinction between express and implied. **Color, in this sense, is defined to be "a feigned matter, pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has, in truth, only an appearance or color of cause."** [246] This is one of the most curious subtleties that belong to the science of pleading; and, though sometimes practised, is now rather of rare occurrence. When color is thus given, the plaintiff is not allowed, in his replication, to traverse the fictitious matter suggested by way of color, for, its only object being to prevent a difficulty of *form*, such traverse would be wholly foreign to the merits of the cause, and would only serve to frustrate the fiction which the law in such case allows. [250] The plaintiff would, therefore, pass over the color without notice, and would either traverse the title of the defendants, if he meant to contest its truth in point of fact, or demur to it, if he meant to except to its sufficiency in point of law; and thus the defendants would obtain their object, of bringing any legal question raised upon their title under consideration of the court, and withdrawing it from the jury.

The practice of giving express color occurs at present in the action of trespass only, nor is it, even in trespass, often found to be expedient. [251] The practice of giving express color seems to be confined to *pleas*, and not to extend to replications or other subsequent pleadings. With respect to giving express color in practice, it is unusual to resort to any except certain known fictions, which long usage has applied to the particular case. Thus in trespass to land, the color universally given is that of a defective *charter of demise*.

With respect to express color, it is laid down **that it must consist of such matter as, if it were effectual, would maintain the nature of the**

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to him a title, *sufficient* for the maintenance of the action; the plea is necessarily ill: since it is, in effect, a *confession* of the plaintiff's right of action." Wills' Gould's Plead., 516, 517.

action. On the other hand, it is to be observed that **the right suggested must be colorable only,** and that it must not amount to a *real* or *actual* right.[9] [252] For if it does, then the plaintiff would, of course, upon the defendant's own showing, be entitled to recover, and the plea would be an insufficient answer.

The pleadings by way of *traverse,* and those by way of *confession and avoidance,* having been now separately considered, **there are yet to be noticed,** [253]

3. **The nature and properties of pleadings in general,** without reference to their quality, as being by way of traverse or confession and avoidance.

First, it is a rule that **every pleading must be an answer to the whole of what is adversely alleged.**[1]

Therefore, in an action of trespass for breaking a close and cutting down three hundred trees, if the defendant pleads, as to cutting down all but two hundred trees, some matter of justification or title, and as to the two hundred trees says nothing, the plaintiff is entitled to sign judgment, as by *nil dicit,* against him in respect of the two hundred trees, and to demur or reply to the plea as to the remainder of the trespasses. In such cases the plaintiff should take care to avail himself of his advantage in this (which is the only proper) course; for if he demurs or replies to the plea, without signing judgment for the part not answered, the whole action is said to be *discontinued.* The principle of this is, that the plaintiff by not taking judgment, as he was entitled to do for the part unanswered, does not follow up his entire demand, and there is consequently that sort of chasm or interruption in the proceedings which is called in the technical phrase a **discontinuance,** and such discontinuance will amount to error on the record. [254] It is to be observed, however, that as to the plaintiff's course of proceeding, **there is a distinction between a case like this, where the defendant does not profess to answer the whole, and a case where, by the commencement of his plea, he professes to do so, but in fact gives a defective and partial answer, applying to part only.** The latter case amounts

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9. See next preceding note.

1. Com. Dig., Pleader, E. 1, F. 4; 1 Saund. 28, n. 3; Herlakenden's Case, 4 Rep. 62 a.

merely to insufficient pleading; and the plaintiff's course therefore is not to sign judgment for the part defectively answered, but to *demur* to the whole plea. It is also to be observed, that **where the part of pleading to which no answer is given is immaterial,** or such as requires no separate or specific answer,— for example, if it be mere matter of *aggravation,*— the rule does not in that case apply. [255]

Again, it is a rule that **every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse.**[2] The effect of **such admission** is extremely strong; for first, it **concludes the party,** even though the jury should improperly go out of the issue and find the contrary of what is thus confessed on the record; and in the next place, the confession operates not only to prevent the fact from being afterwards brought into question in the same suit, but is **equally conclusive as to the truth of that fact in any subsequent action between the same parties. The rule,** however, **extends only to such matters as are traversable;** for matters of *law,* or any other matters which are not fit subjects of traverse, are not taken to be admitted by pleading over. [256]

It is this rule which has given rise to the practice of **protestation in pleading.** When the pleader passes over, without traverse, any traversable fact alleged, and at the same time wishes to preserve the power of denying it *in another action,* he makes, collaterally or incidentally to his main pleading, a declaration importing that this fact is untrue; and this is called a *protestation,* and it has the effect of enabling the party to dispute, in another action, the fact so passed over.[3]

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2. Com. Dig., Pleader, G. 2; Bac. Ab., Pleas, etc., pp. 322, 386, 5th ed.; Hudson v. Jones, 1 Salk. 91; Nicholson v. Simpson, Fort., 356.

3. Com. Dig., Pleader, N.; Co. Litt. 124 b; 2 Saund. 103 a, n. 1; 17 Ed. II. 534; 43 Ed. III. 17; 40 Ed. III. 17, 46; 48 Ed. III. 11.

"A *protestation*, which, according to Sir Edward Coke's definition, is 'the exclusion of a conclusion,' has no other effect, than that of excluding or preventing some adverse allegation, or inference (which stands confessed by the pleadings), from *estopping* the party protesting, in any *other* suit between the same parties, or their *privies*. For it is a general principle, in the law of evidence, that any fact, admitted by the *pleadings*

A protestation is wholly without avail in the action in which it occurs; and under the rule already laid down, every traversable fact not traversed is, notwithstanding the protestation, to be taken as admitted *in the existing suit.* [258]

It is also a rule that, **if upon the traverse the issue is found against the party protesting, the protestation does not avail**; and that it is of no use except in the event of the issue being determined *in his favor;* with this exception, however, that if the matter taken by protestation be such as the pleader could not have taken issue upon, the protestation in that case shall avail, even though the issue taken were decided against him.

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in a suit, will, if not thus excluded, be forever *conclusive* (between the same parties, and those in privity with them), in any other suit, in which the same fact may come in question." Wills' Gould's Plead., 564.

Example of a protestation:

"PLEA IN ASSUMPSIT.

For goods sold and delivered.

And the said *C D*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said *A B* ought not to have or maintain his aforesaid action against him, the said *C D*, because, he says, that after the making of the said promises and undertakings, and before the commencement of this suit, to wit, on the —— day of ———, in the year ———, at ——— aforesaid, in the county aforesaid, he, the said *C D*, gave and delivered to the said *A B* a certain pipe of wine, in full satisfaction and discharge of the said promises and undertakings and of all damages accrued to the said *A B* by reason of the non-performance thereof, which said pipe of wine, so given in full satisfaction and discharge as aforesaid, the said *A B* then and there accepted in full satisfaction and discharge of the said promises and undertakings and of all damages accrued to the said *A B* by reason of the non-performance thereof; and this the said *C D* is ready to verify. Wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action against him.

"REPLICATION.

And the said *A B* says, that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said *C D*, because, *protesting that the said C D did not give or deliver to him, the said A B, the said pipe of wine, as the said C D hath above in pleading alleged*, for replication, nevertheless, in this behalf, the said *A B* says that he, the said *A B*, did not accept the said pipe of wine in full satisfaction and discharge of the said promises and undertakings, and of all damages accrued to the said *A B* by reason of the non-performance thereof, in manner and form as the said *C D* hath above alleged; and this the said *A B* prays may be inquired of by the country."

A protestation ought not to be repugnant to the pleading which it accompanies, nor ought it to be taken on such matter as the pleading itself traverses. The rules, however, with respect to the *form* of a protestation, become the less material, because **neither a superfluous nor repugnant protestation is sufficient ground for demurrer,** the protestation itself having in view *another suit* only, and its faults of form being, therefore, immaterial in the present action. [259]

It is not necessary, in passing over an insufficient pleading without demurrer, and answering in point of fact, to make any protestation of the insufficiency in law of such pleading; for even without the protestation, no implied admission of its sufficiency arises. In practice, however, it is not unusual in such case to make a protestation of *insufficiency in law.*

Such are the doctrines involved in the general rule, *that the party must either demur, or plead by way of traverse or by way of confession and avoidance.* It remains, however, to notice

Certain exceptions to which that branch of the rule is subject which relates to *pleading,* and which requires a party to plead either by way of *traverse* or by way of *confession and avoidance.* [260]

First, **there is an exception in the case of dilatory pleas.** But *replications* and *subsequent pleadings,* following on dilatory pleas, are not within this exception.

Again, **the rule is not applicable to the case of pleadings in estoppel.**[4]

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4. These are pleadings which, without confessing or denying the matter of fact adversely alleged, rely merely on some matter of estoppel as a ground for excluding the opposite party from the allegation of the fact, and after stating the previous act, allegation, or denial on which the estoppel is supposed to arise, pray judgment if he *shall be received or admitted to aver* contrary to what he before did or said. The form is as follows:

"PLEA OF MISNOMER.

In abatement of the bill.

And *C D*, against whom the said *A B* hath exhibited his bill, by the name of *E D*, in his own person comes and says, that he was baptized by the name of *C*, to wit, at ——— aforesaid, and by the christian name of *C* hath always, since his baptism, hith-

Another exception arises in the case of what is called **a new assignment.** [262] In some cases the defendant is not sufficiently guided by the declaration to the real cause of complaint, and is threfore led to apply his plea to a different matter from that which the plaintiff has in view. **A new assignment is a method of pleading to which the plaintiff** in such cases **is obliged to resort in his replication, for the purpose of setting the defendant right.** The mistake being thus set right by the new assignment, it remains for the defendant to plead such matter as he may have in answer to the wrong last mentioned, the first being now out of the question.[5] [265]

As the object of a new assignment is to correct a mistake occasioned by the generality of the *declaration,* **it always occurs in answer to a plea,** and is therefore in the nature of a *replication.* [267] It is not used in any other part of the pleading.

A new assignment chiefly occurs in an action of trespass, but it seems to be generally allowed in all actions in which

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erto been called and known. Without this, that the said *C D* now is, or at the time of exhibiting the said bill was, or ever before had been, called or known by the christian name of *E*, as by the said bill is supposed; and this the said *C D* is ready to verify. Wherefore he prays judgment of the said bill and that the same may be quashed.

"REPLICATION.

And the said *A B* saith, that the said person against whom he hath exhibited his said bill, by the name of *E D, ought not to be admitted or received* to plead the plea by him above pleaded for quashing the bill of him the said *A B*, because, he saith, that the said person against whom he, the said *A B*, hath exhibited his said bill, by the name of *E D*, heretofore, to wit, in the term of ———, last past, came into this court here and put in bail, at the suit of the said *A B*, in the plea aforesaid, by the name of *E D*, as by the record thereof remaining in the said court of our said lord the king, before the king himself, at Westminster, aforesaid, more fully appears; and this he, the said *A B*, is ready to verify by that record. Wherefore he prays judgment if the said person against whom he hath exhibited his said bill, by the name of *E. D, ought to be admitted or received to his said plea* for quashing the said bill, contrary to his own acknowledgment and the said record, and that he may answer over to the said bill." See Wills' Gould's Plead., 99 and notes.

5. See Wills' Gould's Plead., 348, 364, 531.

the form of declaration makes the reason of the practice equally applicable. [268]

Several new assignments may occur in the course of the same series of pleading.

A new assignment is said to be in the nature of a new declaration. It seems, however, to be more properly considered as a repetition of the declaration, differing only in this, that **it distinguishes the true ground of complaint** as being different from that which is covered by the plea. [269] It is to be framed with as much *certainty* or specification of circumstances as the declaration itself. In some cases, indeed, it should be even *more* particular, so as to avoid the necessity of *another* new assignment.[6]

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6. A *novel* or *new* assignment consists in alleging, with all necessary particularity, in the replication, facts which the declaration has alleged in *general terms;* and in this way, the plaintiff may convert into a *substantive* cause of action, what appears, in the declaration, as matter of mere *aggregation.* 2 Chitt. Pl. 653-7; Lawes' Pl., 165; 1 Saund. 299, a, b, n. 6. A new assignment being in the nature of a *declaration;* the defendant may plead to it, *de novo,* as to a common declaration. 3 East, 294; Lawes' Pl., 165; 1 Saund. 299, a, b, n. 6. A new assignment must, in general, conclude with an averment, that the wrongs, or causes of complaint, alleged it it, are *different* from those mentioned in the plea (1 Saund. 299, n. 6; Lawes' Pl., 164-5, 240, 241): for otherwise a new assignment is unnecessary. And if the averment is untrue, the defendant may, for that cause, plead the *general issue* to the new assignment — as that issue involves a denial of the averment. 1 Saund. 299, c, n. 6; Lawes' Pl., 241." Wills' Gould's Plead., 531, note.

"REPLICATION TO THE PLEA OF SON ASSAULT DEMESNE, BY WAY OF NEW ASSIGNMENT.

And as to the said plea of the said *C D* by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, the said *A B* says that, by reason of anything in that plea alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said *C D,* because, he says, that he brought his said action, not for the trespasses in the said second plea acknowledged to have been done, but for that the said *C D* heretofore, to wit, on the —— day of ———, in the year of our Lord ——, with force and arms, at ——— aforesaid, in the county aforesaid, upon another and different occasion, and for another and different purpose than in the said second plea mentioned, made another and different assault upon the said *A B* than the assault in the said second plea mentioned, and then and there beat, wounded, and ill-treated

As the proceeding must either be by demurrer, traverse, or confession and avoidance, so any of these forms of opposition to the last pleading is in itself sufficient. [270]

There is, however, an **exception** to this, in a case which the books consider as anomalous and solitary. It is as follows: If in debt on a bond, conditioned for the performance of an award, the defendant pleads that no award was made, and the plaintiff, in reply, alleges that an award was made, setting it forth, it is held that he must also proceed to state a *breach* of the award, and that without stating such breach the replication is insufficient.

In all other cases, "if the defendant pleads a special matter that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance, supposes it, and the plaintiff need not show that which the defendant hath supposed and admitted.'"[7] [271]

RULE II.

UPON A TRAVERSE, ISSUE MUST BE TENDERED.

It has been shown that, with the exception of a *special* traverse, the different forms all involve a *tender of issue.* **The formulae of tendering the issue in fact vary according to the mode of trial proposed.**

The tender of an issue to be tried by **jury** is by a formula called the **conclusion to the country.** This conclusion is in the following words, when the issue is tendered by the **defendant: "And of this the said C D puts himself upon the country."** When it is tendered by the **plaintiff,** the

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him, in manner and form as the said *A B* hath above thereof complained; which said trespasses, above newly assigned, are other and different trespasses than the said trespasses in the said second plea acknowledged to have been done; and this the said *A B* is ready to verify. Wherefore, inasmuch as the said *C D* hath not answered the said trespasses above newly assigned, he, the said *A B*, prays judgment and his damages by him sustained by reason of the committing thereof to be adjudged to him, &c."

7. Per Holt, C. J., in Meredith v. Alleyn, Salk., 138.

formula is as follows: "**And this the said A B prays may be inquired of by the country.**"[8] [273]

The tender of an issue to be decided by [**record**], **certificate, witnesses, or inspection** is by the following formula: " And this, the said A B (or C D) is ready to verify, when, where, and in such manner as the court here shall order, direct, or appoint.'"[9] [274]

The rule refers chiefly to traverses of such matters of fact as are triable by the country; and, therefore, we find it propounded in the books most frequently in the following form: That **upon a negative and affirmative the pleading shall conclude to the country, but otherwise with a verification.** [275]

To the rule, in whatever form expressed, there is the following **exception: That when new matter is introduced, the pleading should always conclude with a verification.**[1]

To this exception belongs the case formerly noticed, of **special traverses.** These never tender issue, but always conclude with a verification.

RULE III.

ISSUE, WHEN WELL TENDERED, MUST BE ACCEPTED.[2]

If issue be well tendered, both in point of substance and in point of form, nothing remains for **the opposite party** but

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8. It is held, however, that there is no material difference between these two modes of expression, and that if *ponit se* be substituted for *petit quod inquiratur*, or vice versa, the mistake is unimportant. Of the tender of issue thus concluding to the country several examples have already been given in this work, and to these it will now be sufficient to refer. See also, generally, 2d and 3d Chitty's Pleading.

9. 2 Chitty (1st Ed.), 602; Tidd (8th Ed.), 800, 801; Co. Ent., 180 b; Rast., 228; Thorn v. Rolfe, Moore, 14; 3 Chitty (1st Ed.), 599.

1. 1 Saund. 103, n. 1, and the authorities there cited; Whitehead v. Buckland, Stile, 401; Cornwallis v. Savery, 2 Burr. 772; Vere v. Smith, 2 Lev. 5; Vent., 121 S. C.; Sayre v. Minns, Cowp., 575; Henderson v. Withy, 2 T. R. 576.

2. Bac. Ab., Pleas, etc., p. 353, 5th Ed.; Digby v. Fitzharbert, Hob., 104; Wilson v. Kemp, 2 M. & S. 549. "In all pleadings, wherever a traverse was first properly taken, the issue closed." Gilb., C. P., 66.

to accept or join in it, and he **can neither demur, traverse, nor plead in confession and avoidance.**[3] [279]

The acceptance of the issue, in case of a conclusion to the *country, i. e.,* of trial by *jury,* may either be added in making up the issue or paper-book, or may be filed or delivered before that transcript is made up. It is in both cases called the **similiter,** and in the latter case a *special similiter.*

The form of a special similiter is thus: "And the said *A B*" (or "*C D*"), "as to the plea" (*or* "replication," etc.) "of the said *C D*" (*or* "*A B*"), "whereof he hath put himself upon the country," (*or* whereof he hath prayed it may be "inquired by the country"), "doth the like." The similiter, when added in making up the issue or paper-book, is simply this: "And the said *A B*" (*or* "*C D*") "doth the like."

The issue must be accepted only when it is well tendered. [280] For if the opposite party thinks the *traverse* bad, in substance or in form, or objects to the *mode of trial* proposed, in either case he is not obliged to add the similiter, but may *demur,* and if it has been added for him, may strike it out and demur.

No similiter or other acceptance of issue is necessary when recourse is had to any other mode of trial than by jury; [281] and the rule in question does not extend to these.

The rule in question extends to an issue in law, as well as an issue in fact; for by analogy (as it would seem) to the similiter, the party whose pleading is opposed by a demurrer is required formally to accept the issue in law which it tenders by the formula called a **joinder in demurrer.** However, it differs in this respect from the similiter, that whether the issue in law be well or ill tendered —that is, whether the demurrer be in proper form or not — the opposite party is equally bound to join in demurrer. For it is a rule, that **there can be no demurrer upon a demurrer.**[4]

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3. But he may plead in *estoppel.*

4. Bac. Ab., Pleas, etc., N. 2; Campbell v. St. John, 1 Salk. 219.

SECTION II.

OF RULES WHICH TEND TO SECURE THE MATERIALITY OF THE ISSUE. [282]

RULE.

ALL PLEADINGS MUST CONTAIN MATTER PERTINENT AND MATERIAL.

With respect to traverses in particular, it is laid down:—

1. **That traverse must not be taken on an immaterial point.**[5] [283]

This rule prohibits, first, the taking of a traverse on a point wholly immaterial.

So a traverse is not good when taken on matter the allegation of which was premature, though in itself not immaterial to the case.[6] [284]

Again, **this rule prohibits the taking of a traverse on matter of aggravation;** that is, matter which only tends to increase the amount of damages, and does not concern the right of action itself.[7]

So it is laid down that, **in general, traverse is not to be taken on matter of inducement;**[8] that is, matter brought forward only by way of explanatory introduction to the main allegations. But this is **open to many exceptions,** for it often happens that introductory matter is in itself essential, and of the substance of the case, and in such instances, though in the nature of inducement, it may nevertheless be traversed. [285]

While it is thus the rule, that traverse must not be taken on an immaterial point, it is, on the other hand, to be observed that, **where there are several material allegations,**

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5. Com. Dig., Pleader, R. 8, G. 10; Bac. Ab., Pleas, etc., H. 5.

6. Sir Ralph Bovy's Case, 1 Vent. 217, where see another example.

7. Leech v. Widsley, 1 Vent. 54; 1 Lev. 283 S. C.

8. Com. Dig., Pleader, G. 14; Kinneraley v. Cooper, Cro. Eliz., 168; Carvick v. Blagrave, 1 Brod. & Bing. 531.

it is in the option of the pleader to traverse which he pleases.

It is also laid down:

2. **That a traverse must not be too large, nor, on the other hand, too narrow.**[9] [286]

As a traverse must not be taken on an immaterial allegation, so, when applied to an allegation that is material, it ought, in general, to take in no more and no less of that allegation than is material. If it involves *more,* the traverse is said to be too *large;* if less, too *narrow.*

A traverse may be too large, by involving in the issue quantity, time, place, or other circumstances, which, though forming part of the allegation traversed, are immaterial to the merits of the cause.

Again, a traverse may be too large, by being taken in the conjunctive, instead of the disjunctive, where it is not material that the allegation traversed should be proved conjunctively.[1] [288]

On the other hand, however, **a party may, in general, traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent;** and such traverse will not be considered as too large.[2] [289]

Of a traverse too narrow, the following is an example: In assumpsit for a compensation for service as a hired servant, the plaintiff alleged that he served from the 21st of March, 1647, to 1st November, 1664; the defendant pleaded that the plaintiff continued in the service till December, 1658, and then voluntarily quitted the service; *without this, that he served until the* 1*st of November,* 1664. [291] This was a bad traverse, for, as the plaintiff, in this action for damages, is entitled to compensation, *pro tanto,* for any

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9. 1 Saund. 268, n. 1, 269, n. 2; Com. Dig., Pleader, G. 15, G. 16.

1. Goran v. Sweeting, 2 Saund. 205.

2. Com. Dig., Pleader, G. 16; Sir Francis Leke's Case, Dy., 365; 2 Saund. 207, n. 24; Wood v. Budden, Hob., 119; Tatem v. Perient, Yelv., 195; Carvick v. Blagrave, 1 Brod. & Bing. 531. Palmer v. Elkins, 2 Str. 818, is apparently contra, but, from the report of the same case (Ld. Ray., 1550), it may be reconciled with the other authorities.

period of service, it is obviously no answer to say that he did not serve the whole time alleged.[3]

So a traverse may be too narrow, by being applied to part only of an allegation, which the law considers as in its nature indivisible and entire, such as that of a prescription or grant.[4]

SECTION III.

OF RULES WHICH TEND TO PRODUCE SINGLENESS OR UNITY IN THE ISSUE. [292]

RULE I.

PLEADINGS MUST NOT BE DOUBLE.[5]

This rule applies both to the declaration and subsequent pleadings. Its meaning, with respect to the former, is, that the **declaration must not, in support of a single demand, allege several distinct matters,** by any one of which that demand is sufficiently supported.[6] [293] **With respect to**

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3. Osborne v. Rogers, 1 Saund. 267. This is a case which could not arise in assumpsit at the present day, because, by the modern practice, the plea would be only non-assumpsit.

4. Morewood v. Wood, 4 T. R. 157; and see Doct. Pl., 351, 352, 370; Briddle and Napper's Case, 11 Rep. 10 b; Bradburn v. Kennerdale, Carth., 164; 1 Saund. 268, n. 1.

5. Com. Dig., Pleader, C. 33, E. 2, F. 16; Bac. Ab., Pleas, etc., K.; Humphreys v. Bethily, 2 Vent. 198, 222; Doct. Pl., 135.

6. *Misjoinder* of causes of action, or counts, consists in joining, in different counts in one declaration, several different demands — which the law does not permit to be joined— to enforce several *distinct, substantive* rights of recovery: as, where a declaration joins a count in trespass with another in *case*, for distinct wrongs—or one count in *tort*, with another in *contract*.

Duplicity in a declaration consists in joining, in one and the *same count*, different grounds of action, of different natures, or of the same nature, to enforce only a *single* right of recovery. This is a fault in pleading, only because it tends to useless prolixity and confusion, and is therefore only a fault in *form*.

Thus were the plaintiff declared, in *one count*, that whereas he had bailed

the subsequent pleadings, the meaning is, that one of them is to contain several distinct answers to that which preceded it, and the reason of the rule in each case is, that such pleading tends to several issues in respect of a single claim.

The object of this rule being to enforce a single issue, upon a *single subject of claim,* admitting of several issues, where the claims are *distinct,* the rule is, accordingly, carried no further than this in its application. [296] **The declaration, therefore, may, in support of several demands, allege as many distinct matters as are respectively applicable to each.**[7]

So the plea, though it must not contain several answers to the whole of the declaration, may nevertheless make distinct answers to such parts of it as relate to different matters of claim or complaint. [297]

So in the replication and other subsequent parts of the series a severance of pleading may take place in respect of several subjects of claim or complaint.

The power, however, of alleging in a plea distinct matters, in answer to such parts of the declaration as relate to different claims, seems to be subject to this **restriction:** that **neither of the matters so alleged be such as would alone be a sufficient answer to the whole.** [298] Thus if an action be brought on two bonds, though the defendant may plead as to one, payment, and as to the other, duress; yet if he pleads as to one a release *of all actions,* and as to the other

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to the defendant a horse, to be ridden from L. to E., and there to be safely redelivered to the plaintiff; the defendant, *intending to deceive* the plaintiff, rode the horse from L. to E. and *from E. to L.* again; and by riding so far, *abused* the horse, &c.; and also, that the defendant had *refused to redeliver* the horse on demand, and *converted him* to his own use—it was held that the declaration was demurrable, for *duplicity.* For the declaration, in one count, stated two or three *distinct* grounds of action, sounding in both *contract* and *tort;* though the plaintiff's loss, or damage sustained, entitled him to only a *single, entire* right of recovery —which he might have enforced, by declaring in only one form of action." Wills' Gould's Plead., 401, 402.

7. Take the case of an action of covenant, on a covenant to pay a sum by several installments. In this case the plaintiff might, without duplicity, declare that the defendant "did not pay the said total sum, or any part thereof, upon the several days aforesaid."

duress, it will be double, for the release is alone a sufficient answer to both bonds.

Again, if there be several defendants, the rule against duplicity is not carried so far as to compel each of them to make the same answer to the declaration. Each defendant is at liberty to use such plea as he may think proper for his own defence, and they may either join in the same plea or sever, at their discretion. **But if the defendants have once united in the plea they cannot afterwards sever** at the rejoinder or other later stage of the pleading. [299]

Where, in respect of several subjects or several defendants, a severance has thus taken place in the pleading, this may, of course, lead to a corresponding severance in the whole subsequent series, and, as the ultimate effect, to the production of *several issues*. And where there are several issues they may respectively be decided in favor of different parties, and the judgment will follow the same division.

Such being, in general, the nature of duplicity, the following rules or points of remark will tend to its further illustration: —

1. **A pleading will be double that contains several answers, whatever be the class or quality of the answer.**[8] Thus it will be double by containing several matters in abatement or several matters in bar, or by containing one matter in abatement and another in bar. So a pleading will be double by containing several matters in confession and avoidance, or several answers by way of traverse, or by combining a traverse with a matter in confession and avoidance. [300]

2. **Matter [upon which a material issue may be taken] may suffice to make a pleading double, though it be ill pleaded.**[9]

On the other hand, it seems that

3. **Matter immaterial cannot operate to make a pleading double.**[1]

4. **No matter will operate to make a pleading double that**

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8. Bleeke v. Grove, 1 Sid. 176.

9. Bleeke v. Grove, *supra*.

1. Countess of Northumberland's Case, 5 Rep. 989.

is pleaded only as necessary inducement to another allegation.[2] [302]

5. **No matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point.**[3] This qualification of the rule against duplicity applies not only to pleadings in confession and avoidance, but to traverses also; so that a man may deny as well as affirm, in pleading, any number of circumstances that together form but a single point or proposition. [304]

The most frequent instance of this cumulative traverse, as it may be called, occurs in the case of the replication, *de injuria absque tali causa.* It is, however (as was formerly stated), a **restriction** in the use of this replication, that it cannot be applied so as to include in the traverse any matter alleged on the other side in the nature of *title, interest, commandment, authority,* or *matter of record.* [305] If, therefore, any such matter be contained in the plea, and the plaintiff wishes to deny it, such matter must be traversed separately; or if he chooses not to point the denial to this, but to other matters in the plea, these other matters must separately form the subject of traverse. [306] And it is to be observed that this restriction, by which matter of *title, interest, commandment, authority,* or *record* is required to be separately traversed, is not to be taken as applicable merely to the use of the replication de injuria, but extends in its principle to *all* cases of cumulative traverse, so that it may be said to be generally true, that where any such matter is alleged in connection with other circumstances, it is not a case in which it is competent to the other party to traverse cumulatively; and that if he include all these circumstances in the same traverse, his pleading will be double.

In some cases the general issues appear to partake of the nature of these cumulative traverses. [307] For some of them are so framed as to convey a denial, not of any par-

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2. Bac. Ab., Pleas, etc., K. 2; Com. Dig., Pleader, E. 2; 24 E. III, 75 b.

3. Vin. Ab., Double Pleas, A. 7, cites 2 Ed. IV, 8.

ticular fact, but generally of the whole matter alleged, as *not guilty* in trespass or trespass on the case, and *nil debet* in debt. And in assumpsit the case is the same in effect, according to a relaxation of practice formerly explained, by which the defendant is permitted, under the general issue, in that action, to avail himself, with some few exceptions, of any matter tending to disprove his liability. The consequence is that, **under these general issues the defendant has the advantage of disputing, and therefore of putting the plaintiff to the proof of, every averment in the declaration.** Indeed, besides this advantage of double *denial*, **the defendant obtains, under the general issue, in assumpsit and other actions of trespass on the case, the advantage of double pleading in confession and avoidance.** For as, upon the principles formerly explained, he is allowed, in these actions, to bring forward, upon the general issue, almost any matters (though in the nature of confession and avoidance), which tend to disprove his debt or liability, so he is not limited (as he would be in special pleading), to a reliance on any single matter of this description, but may set up any number of these defences. [308] While such is the effect of many of the general issues in mitigating or evading the rule against duplicity, **the remark does not apply to all.** Thus the general issue of **non est factum rises only a single question,** namely, whether the defendant executed a valid and genuine deed, such as is alleged in the declaration. The defendant may, under this plea, insist that the deed was not executed by him, or that it was executed under circumstances which absolutely annul its effect as a deed, but can set up no other kind of defence.

6. **A protestation will not make the pleading double.**[4]

The rule against duplicity in pleading being now explained,[5] it is necessary to advert to **certain modes of practice by which the effect of that rule is materially qualified and evaded.** [309] These are, the use of **several counts** and the allowance of **several pleas,** the former being grounded on ancient practice, the latter on the stat. 4 Anne, c. 16.

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4. 3 Black. Com. *311, Vol. I.

5. See, generally, as to duplicity, Wills' Gould's Plead., ch. 3.

First, several counts.

Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same original writ, subject to certain rules which the law prescribes, as to joining such demands only as are of similar quality or character.[6] Where a plaintiff thus makes several demands by the same writ, his course of proceeding in debt, covenant, and detinue, and the real and mixed actions, where the writs are in a simple and general form, is merely to enlarge his claim in point of sums and quantities; but in trespass, and trespass on the case, where the form is more special, the original writ separately specifies each subject of claim or complaint. [310] And **when the time for the declaration arrives, the plaintiff in all forms of action sets forth in the declaration, separately, each different subject of claim or complaint** thus put together in the same writ. Such different claims or complaints constitute different parts or sections of the declaration, and are known in pleading by the description of **several counts.**[7]

When several counts are thus used, the defendant may, according to the nature of his defence, demur to the whole; or plead a single plea applying to the whole; or may demur to one count and plead to another; or plead a several plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. [314] But whether one or more issues be produced, **if the decision, whether in law or fact, be in the plaintiff's favor, as to any one or more counts, he is entitled to judgment pro tanto,** though he fail as to the remainder.

The use of several counts, when applied to *distinct causes of action,* is quite consistent with the rule against duplicity. **But it happens more frequently than otherwise that, when various counts are introduced, they do not really relate to distinct claims, but are adopted merely as so many different forms of propounding the same cause of action,** and are therefore a mere evasion of the rule against duplicity. [315]

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6. See *ante*, section III, Rule 1, note.

7. See Wills' Gould's Plead., 352 *et seq.*

This is a relaxation of very ancient date, and has long since passed, by continual sufferance, into allowable and regular practice. It takes place when the pleader, in drawing the declaration or bill in any action, or in preparing the praecipe for an original writ in trespass, or trespass on the case, after having set forth his case in one view, feels doubtful whether, as so stated, it may not be insufficient in point of law, or incapable of proof in point of fact; and at the same time perceives another mode of statement, by which the apprehended difficulty may probably be avoided. Not choosing to rely on either view of the case exclusively, he takes the course of adopting both; and accordingly inserts the second form of statement in the shape of a second count, in the same manner as if he were proceeding for a separate cause of action. If, upon the same principle, he wishes to vary still further the method of allegation, he may find it necessary to add many other succeeding counts besides the second; and thus, in practice, a great variety of counts often occurs in respect of the same cause of action, the law not having set any limits to the discretion of the pleader, in this respect, if fairly and rationally exercised. [316]

Upon this principle, **the four counts for money lent and advanced, money paid, money had and received,** and **money due on account stated (commonly called the money counts), are, some or all of them, generally inserted, as a matter of course, in every praecipe, declaration, or bill in assumpsit,** though the cause of action be also stated in a more special form in other counts.[8] [318]

8. "DECLARATION IN ASSUMPSIT, FOR GOODS SOLD, WORK DONE, MONEY LENT, &c.

(*By original.*)

In the King's Bench, ——— Term, in the —— year of the reign of King George the Fourth.

———, to wit, *C D* was attached to answer *A B* of a plea of trespass on the case. And thereupon the said *A B*, by ———, his attorney, complains: For that whereas the said *C D* heretofore, to wit, on the —— day of ———, in the year of our Lord ——, at ———, in the county of ———, was indebted to the said *A B* in the sum of —— pounds, of lawful money of Great Britain, for divers *goods, wares, and merchandises* by the said *A B* before that time *sold and delivered* to the said *C D*, at his special instance and request; and, being so indebted, he, the said *C D*, in consideration thereof,

Whether the subjects of several counts be really distinct or identicial, they must always purport to be founded on distinct causes of action, and not to refer to the same matter; and this is effected by the insertion of such words as "other," "the further sum," etc. [319] This is evidently

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afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A B* to pay him the said sum of money when he, the said *C D*, should be thereto afterwards requested. *And whereas also* the said *C D* afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, was indebted to the said *A B* in the further sum of —— pounds, of like lawful money, for *work and labor, care and diligence,* by the said *A B* before that time *done, performed, and bestowed,* in and about the business of the said *C D*, and for the said *C D*, at his like instance and request, and, being so indebted, he, the said *C D*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A B* to pay him the last-mentioned sum of money when he, the said *C D*, should be thereto afterwards requested. *And whereas also* the said *C D* afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, was indebted to the said *A B* in the further sum of —— pounds, of like lawful money, for so much *money* by the said *A B* before that time *lent and advanced* to the said *C D*, at his like instance and request, and, being so indebted, he, the said *C D*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A B* to pay him the said last-mentioned sum of money when he, the said *C D*, should be thereto afterwards requested. *And whereas also* the said *C D* afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, was indebted to the said *A B* in the further sum of —— pounds, of like lawful money, for so much *money* by the said *A B* before that time *paid, laid out, and expended* to and for the use of the said *C D*, at his like instance and request; and, being so indebted, he, the said *C D*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A B* to pay him the said last-mentioned sum of money when he, the said *C D*, should be thereto afterwards requested. *And whereas also* the said *C D* afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, was indebted to the said *A B* in the further sum of —— pounds, of like lawful money, for so much *money* by the said *C D* before that time *had and received*, to and for the use of the said *A B*, and, being so indebted, he, the said *C D*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A*

rendered necessary by the rule against duplicity, which, though *evaded*, as to the declaration, by the use of several counts, in the manner here described, is not to be directly *violated*.

The next subject for consideration is that of **several pleas.**

The rule against duplicity does not prevent a defendant from giving distinct answers to different claims or com-

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B to pay him the said last-mentioned sum of money when he, the said *C D*, should be thereto afterwards requested. *And whereas also* the said *C D* afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, accounted with the said *A B* of and concerning divers other sums of money from the said *C D* to the said *A B* before that time due and owing, and then in arrear and unpaid; and upon that *account* the said *C D* was then and there found to be in arrear and indebted to the said *A B* in the further sum of —— pounds, of like lawful money, and, being so found in arrear and indebted, he, the said *C D*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A B* to pay him the said last-mentioned sum of money when he, the said *C D*, should be thereto afterwards requested. Yet the said *C D*, not regarding his said several promises and undertakings, but contriving and fraudulently intending, craftily and subtlely, to deceive and defraud the said *A B* in this behalf, hath not yet paid the said several sums of money, or any part thereof, to the said *A B* (although oftentimes afterwards requested). But the said *C D*, to pay the same or any part thereof, hath hitherto wholly refused and still refuses, to the damage of the said *A B* of —— pounds; and therefore he brings his suit, &c."

We have given these counts *in extenso*. In practice they are often very much abbreviated. The student is advised to purchase a set of printed blank declarations *in assumpsit* and other actions and study them carefully.

In order that the student may compare the common counts of our author's time with the form in use today in Illinois and Michigan and probably other states, we here reproduce a declaration on the common counts. On this in practice should be indorsed a copy of the account sued on and an affidavit of the amount due. See, generally, Wills' Gould's Plead., 352, 354 and notes:

"IN THE CIRCUIT COURT OF COOK COUNTY.

(October Term, A. D., 1914.)

State of Illinois, } ss.:
Cook County, }

John Jones and Henry Jackson, partners, doing business in the city of Chicago and State of Illinois, under the firm name and style of Jones & Company, plaintiffs in this suit, by Marshall D. Ewell, their attorney, complain of Thomas Jenkins of the same place, defendant in this suit, summoned, etc., on a plea of trespass on the case, on promises.

For that whereas, the said defend-

plaints on the part of the plaintiff. To several counts, or to distinct parts of the same count, he may, therefore, plead several pleas, viz., one to each.

But it may also happen that a defendant may have several distinct answers to give to the same claim or complaint. [320] Anterior, however, to the regulation, which will be presently mentioned, it was not competent to him to plead these several answers, as that would have been an infringement of the rule against duplicity. **The defendant was,**

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ant, heretofore, to wit, on the first day of October, in the year of our Lord one thousand nine hundred and fourteen, at Chicago, to wit: at the county aforesaid, became and was indebted to the said plaintiffs in the sum of one thousand dollars, of lawful money of the United States of America, for divers *goods, wares and merchandise*, by the said plaintiffs before that time *sold and delivered* to the said defendant and at the special instance and request of the said defendant, and being so indebted to the said plaintiffs the said defendant in consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

***And whereas, also*, the said defendant afterwards, to wit: on the same day and year, at the place aforesaid in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendant, *sold and delivered* to the said defendant divers *other goods, wares, and merchandise* of the said plaintiffs, the said defendant then and there undertook, and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff *so much money as the last aforesaid goods, wares, and merchandise*, at the time of the sale and delivery thereof, *were reasonably worth* when the said defendant should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof were reasonably worth the further sum of one thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid had notice.**

***And whereas, also*, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of one thousand dollars, of like lawful *money* as aforesaid, for money before that time *lent and advanced* by the said plaintiffs to the said defendant and at the like request of the said defendant. And in the like sum for other *money* by the said plaintiffs before that time *paid, laid out and expended* for the said defendant and at the like request of the said defendant. And in the like sum for other *money* by the**

therefore, obliged to elect between his different defences, where more than one thus happened to present themselves, and to rely on that which, in point of law and fact, he might deem most impregnable. [321] **The stat. 4 Anne, c. 16, s. 4,** however, provides, that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defence."[9]

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said defendant before that time *had and received* to and for the use of the said plaintiffs. And in the like sum for other *money* before that time and then *due and owing* the said plaintiffs *for interest* upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiffs. And in the like sum for the *price and value of work then done and material for the same provided* by the said plaintiffs for the said defendant and at the like special request, of the said defendant. And being so indebted the said defendant in consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant, afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, *accounted together* with the said plaintiffs of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiffs and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of one thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, the said defendant in consideration thereof afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc.), has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore the said plaintiffs bring suit, etc.

MARSHALL D. EWELL,
Plaintiffs attorney.

9. "PLEAS IN TRESPASS, FOR ASSAULT AND BATTERY.

And the said *C D*, by ———, his

When several pleas are pleaded, either to different matters, or (by virtue of the statute of Anne) to the same matter, **the plaintiff may, according to the nature of his case, either demur to the whole, or demur to one plea and reply to the other, or make a several replication to each plea;** and in the two latter cases, the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues.* [322] But whether one or more issues be produced, **if the decision, whether in law or fact, be in the defendant's favor, as to any one or more pleas, he is entitled to judgment,** though he fail as to the remainder; i. e., he is entitled to judgment in respect of that subject of demand or complaint to which the successful plea relates: and if it were pleaded to the whole declaration, to judgment generally, though the plaintiff should succeed as to all the other pleas.

By a relaxation similar to that which has obtained with respect to several counts, the use of several pleas (though presumably intended by the statute to be allowed only in a case where there are really several grounds of defence), is, in practice, carried much further. [323] In modern practice such pleas, notwithstanding an apparent repugnancy between them, are permitted, and **the only pleas, perhaps, which have been uniformly disallowed, on the mere ground of inconsistency, are those of the general issue and a tender.**[1] [324]

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attorney, comes and defends the force and injury, when, &c., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said *A B* hath above thereof complained; and of this the said *C D* puts himself upon the country. *And for a further plea* in this behalf, the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A B* ought not to have or maintain his aforesaid action against him, because, he says, that he, the said *C D*, was not, at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said declaration mentioned, or any part thereof, in manner and form as the said *A B* hath above complained; and this the said *C D* is ready to verify. Wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action against him.

And now, generally, he may so plead without first obtaining leave of court. See local works on practice.

1. See Wills' Gould's Plead., 501.

The statute extends to the case of pleas only, and not to replications or subsequent pleadings. These remain subject to the full operation of the common law against duplicity, so that, though to each plea there may, as already stated, be a separate replication, yet there cannot be offered to the same plea more than a single replication, nor to the same replication more than one rejoinder; and so to the end of the series.

The power of pleading several matters extends to pleas in bar only, and not to those of the dilatory class, with respect to which the leave of the court will not be granted. [326]

The statute does not operate as a total abrogation, even with respect to pleas in bar, of the rule against duplicity. For first, it is necessary (as we have seen) to obtain *the leave of the court* to make use of several matters of defence; and then the several matters are pleaded formally, with the words "by leave of the court for this purpose first had and obtained." The several defences must also each be pleaded as a *new* or *further* plea, with a formal commencement, and conclusion as such; so that **it would still be improper to incorporate several matters in one plea** in any case in which the plea would be thereby rendered double at common law.

Under this rule against duplicity it remains only to observe that, **if, instead of demurring for duplicity, the opposite party passes the fault by, and pleads over, he is, in that case, bound to answer each matter alleged**; and has no right, on the ground of the duplicity, to confine himself to any single part of the adverse statement.[2] [327]

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2. "But double pleading (or duplicity), when not warranted by the statute, is only a fault in *form;* and therefore, under the statute, 27 Eliz., c. 5 (*a*), no advantage can be taken of it, except by *special demurrer*. For the ground of objection to such pleading is, not that it is *deficient in substance*, but that it contains *more* than is necessary.

But though, where two distinct and sufficient matters, not warranted by the statute to be pleaded together, are pleaded to the same point, by one party, the other may demur for that cause; yet if, instead of demurring, he *pleads over*, he must answer *both* of them: otherwise, the part unanswered will remain decisive against him. And in such a case, an answer (in itself single), to *each* mat-

1 Saund. 347, n. 1; Hob., 16; Wiles,

RULE II.

IT IS NOT ALLOWABLE BOTH TO PLEAD AND TO DEMUR TO THE SAME MATTER.[3]

The rule only prohibits the pleading and demurring *to the same matter*. **It does not forbid this course as applicable to distinct statements.** Thus a man may plead to one count, or one plea, and demur to another.

The statute of Anne, which authorizes the pleading of several pleas, gives no authority for demurring and pleading to the same matter. [328]

SECTION IV.

OF RULES WHICH TEND TO PRODUCE CERTAINTY OR PARTICULARITY IN THE ISSUE.

RULE I.

THE PLEADINGS MUST HAVE CERTAINTY OF PLACE.

The present law of venue may be stated as follows: —

First, **the original writ must be directed to the sheriff of some county; and in that county the action is said to be brought or laid.** [329] **Each affirmative traversable allegation in the writ is to be laid with a venue or place,** comprising not only the *county* in which the fact arose, but the *parish, town* or *hamlet* within the county; but **in a mere**

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ter, does not constitute *duplicity:* for the two answers are not to *one and the same* point, but to two *different* points. If, for example, to a plea of *infancy*, in assumpsit, the plaintiff replies *necessaries*, and also a *promise* after full age; the defendant, if he does not demur for the duplicity, must give a substantive, single answer to the allegation of necessaries, and another, to that of the subsequent promise. For if the rejoinder should answer but *one* of these allegations; the other, remaining unanswered, would destroy the plea in bar." Wills' Gould's Plead., 341.

3. Wills' Gould's Plead., 340 and notes.

denial, of course, **no venue is to be used, nor is any required in respect of facts not traversable,** for example, matter of inducement or aggravation. [330] **Of the different facts alleged in the writ, it is necessary that some principal one, at least, should be laid in some parish, town, or hamlet, within the county in which the action is brought,** in order to justify the bringing of the action in that county; and such county, and the particular place so laid within it, are called **the venue in the action,** or the *venue where the action is laid.* [331]

The declaration, as it conforms to the writ in other particulars, so it adheres of necessity to the same venue. The county where the action is laid is placed at the commencement, in the margin of the declaration, and all the different affirmative traversable allegations are to be laid with a venue of parish, town, or hamlet, as well as county, in the same manner as above explained with regard to the writ, and in accordance with that instrument.

Whether the action be by original or by bill, **the plea, replication and subsequent pleadings lay a venue to each affirmative traversable allegation,** according to the principles already stated, until issue joined.[4] [332]

The original object of thus laying a venue being to determine the place from which the venire facias should direct the jurors to be summoned, in case the parties should put themselves upon the country, it will be proper now to con-

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4. "It is a general rule, that the *place* of every *traversable* fact, stated in the pleadings, must be distinctly alleged: or, at least (as the rule is now understood and applied), that some certain place must be alleged for every such fact. This is done by designating the *city, town, village, parish* or *hamlet,* together with the *county,* in which the fact is alleged to have occurred; and the place, thus designated, is called the *venue:* the term, '*venue*' (*vicinage*), signifying, in strictness, not the *county* in which the action is brought; but the particular *city, town, parish, hamlet,* etc., in which the fact alleged occurred or is supposed to have occurred, and which is stated as situate in the county named in connection with it. In its present acceptation, however, the word *venue* is most frequently used to comprehend, as well the *county,* as the town, parish or other *vicinage,* in which the fact alleged arose, or is stated to have arisen." Wills' Gould's Plead., 263-264.

sider how far the same use is made of the venue in modern practice.

The most ancient practice, as established at the period when juries were composed of persons cognizant of their own knowledge of the fact in dispute, was, of course, to summon the jury from that venue which had been laid to the particular fact *in issue,* and from the venue of *parish, town, or hamlet,* as well as county.[5] This practice soon sustained very considerable changes. [334] When the jury began to be summoned no longer as witnesses, but as judges, and instead of being cognizant of the fact on their own knowledge, received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighborhood ceased to apply, and it was considered as sufficient if, by way of partial conformity with the original principle, a *certain number of the jury* came from the same *hundred* in which the place laid for venue was situate, though their companions should be of the county only, and neither of the venue nor even of the hundred. This change in the manner of executing the venire did not, however, occasion any alteration in its *form,* which still directed the sheriff, as in former times, to summon the whole jury from the particular venue. In this state of the law was passed **the statute 16 and 17 Car. II. c. 8.** By this act (which is one of the statutes of jeofails) it is provided, "**that after verdict judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid.**" [335] This provision was held to apply to the case (among others) where issue had been taken on a fact laid with a different venue from that *in the action,* but where the venire had improperly directed a jury to be summoned from the *venue in the action,* instead of the venue *laid to the fact in issue.* This had formerly been matter of *error,*

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5. If the fact happened out of any parish, town, or hamlet, but in some other *known place,* such as a forest, or the like, such *known place* may be laid for venue. (Co. Litt., 125 a, b; Bac. Ab., Visne, E., in marg. And if it happened out of any parish, town, hamlet, or *known place,* the venue may be laid in the county generally. Bac. Ab., ibid.

and, therefore, ground for arresting or reversing the judgment; but by this act (passed with a view of removing what had become a merely formal objection) the error was cured, and the staying or reversal of the judgment disallowed.

While such was its direct operation, it has had a further effect, not contemplated, perhaps, by those who devised the enactment. For **what the statute only purported to cure as an error, it has virtually established as regular and uniform practice; and issues taken on facts laid with a different venue from that in the action have, for a long time past, been constantly tried, not by a jury of the venue laid to the fact in issue, but by a jury of the venue in the action.**

Another change was introduced by the statute 4 Anne, c. 16, sect. 6. This act provides that "**every venire facias for the trial of any issue shall be awarded of the body of the proper county where such issue is triable,**" instead of being (as in the ancient form) awarded from the particular venue of parish, town, or hamlet. [336] From this time, therefore, the form of the venire has been changed, and directs the sheriff to summon twelve good and lawful men, etc., "from the body of his county," and they are accordingly, in fact, all summoned from the body of the county only, and no part of them necessarily from the hundred in which the particular place laid for venue is situate.

On the whole, then, by the joint effect of these two statutes, the venire, instead of directing the jury to be summoned from that venue which had been laid to the fact *in issue,* and from the venue of *parish, town, or hamlet,* as well as county, **now directs them, in all cases, to be summoned from the body of the county in which the action is laid,** whether that be the county laid to the fact in issue or not, and without regard to the parish, town, or hamlet.

How far it is necessary to lay the venue truly. [337] Before the change in the constitution of juries above mentioned, the venue was of course always to be laid in the true place where the fact arose. But when, in consequence of that change, this reason ceased to operate, **the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in**

which it was not so. A difference began now to be recognized between **local** and **transitory** matters. **The former** consisted of such facts as carried with them the idea of some certain place, **comprising all matters relating to the realty, and hardly any others; the latter consisted of such facts as might be supposed to have happened anywhere,** and, therefore, comprised debts, contracts, and generally all matters relating to the person or personal property. **With respect to the former, it was held, that if any local fact were laid in pleading at a certain place, and issue were taken on that fact, the place formed part of the substance of the issue,** and must, therefore, be proved as laid, or the party would fail as for want of proof. **But as to transitory facts, the rule was, that they might be laid as having happened at one place, and might be proved on the trial to have occurred at another.**[6]

The present state of the law, with respect to the necessity of laying the true venue, is accordingly as follows: —

Actions are either local or transitory. [338] An action is **local,** if all the principal facts on which it is founded be local; and **transitory,** if any principal fact be of the transitory kind. **In a local action, the plaintiff must lay the venue in the action truly.**[7] **In a transitory one, he may lay it in**

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6. "In the application of this ancient rule, however, a distinction, suggested by general convenience, was soon established between *things local* and *transitory;* and consequently between *local* and *transitory actions*. In *local* actions, the preceding rules regarding locality of trial were still adhered to; while those of a *transitory* nature became, by an arbitrary laying of the venue, triable in any county, in which the venue was laid in *the pleadings*. Hence in local actions, the place has ever been, and still is, material; and must therefore be laid according to the truth. But in actions transitory, the ancient rule as to the locality of actions and trials, is now, and has long been, entirely disregarded, or rather *evaded*, to every purpose except the mere *form of laying some venue*, and the power of the court, under special circumstances, to *change* it, i. e. to change the county, on motion. In *transitory* action, therefore, the plaintiff is at liberty to lay the venue in what county he pleases." Wills' Gould's Plead., 266.

7. "Of those which continue local by the *common* law, are:

a. *All actions in which the subject or thing to be recovered, is in its nature local.* Of this class are all *real* actions — actions of *waste*, when brought on the statute of *Gloucester*

any county, and any parish, town, or hamlet within the county, that he pleases.

(6 Edw. 1), to recover, together with damages, the *locus in quo*, or place wasted — and actions of *ejectment*. All these are local, because they are brought to recover the seisin or possession of lands or tenements, which are local subjects. And if the place — as the parish, etc., where the land, or subject in demand, is situated — be mis-stated, the plaintiff will be liable to a nonsuit, by reason of the misdescription of the *subject-matter* of the suit: because the place enters into the description of it.

b. *Various actions*, which do not seek the direct *recovery* of lands or tenements, are also local, by the common law; because they *arise out* of some local subject or the violation of some local right or interest. Thus the action of *quare impedit* is local, inasmuch as the *benefice*, in the right of presentation to which the plaintiff complains of being obstructed, is so. Within this class of cases are also many actions, in which only *pecuniary* damages are recoverable. Such are the *common-law* action of *waste* and trespass *quare clausum fregit:* as likewise trespass on the case for injuries affecting things *real* —as for *nuisances* to houses or lands —*disturbance* of right of way, or of common—*obstruction* or *diversion* of ancient water-courses, etc.

If, however, a tortious act, committed in *one* county, occasions damage to land or any other local subject, situate in *another;* an action for the injury thus occasioned, may be laid in either of the two counties, at the choice of the party injured. Thus, if by the diversion or obstruction of a water-course, in the county of A., damage is done to lands, mills or other real property in the county of B., the party injured may lay his action in either of those two counties. Wills' Gould's Plead., 269.

"The action of *replevin* also, though it lies for damages only, and does not arise directly out of the violation of any local right, is [at common law] nevertheless *local*. Citing 1 Saund. 347, n. 1; Hob., 16; Wiles, 478; 1 Stra. 507-8; 2 Wils. 354; 1 Chitt. Pl. 161; 2 ib. 364 (n. c and e); McLeod v. Railroad Company, 58 Vt. 727. The reason of its locality—(a reason which applies to no other action for injuries of *personal* chattels) —appears to be the necessity of giving a *local description* of the taking complained of. For in declaring in replevin, it is necessary to describe, and to describe truly, the *locus in quo*—i. e. the close, house or common, in which the cattle or goods in question were taken by the defendant: and as the necessity of alleging the true *place* of caption involves the necessity of laying the true *town, parish* or *bill*, and of course the true county; the venue and county as well as the close, etc., are consequently *material*, and the action is of necessity local. If, however, replevin lies, by the common law, only for goods *distrained;* there would seem to be another and more fundamental reason for its locality, viz., that the *right of distress*, which the action is intended to contest, is at common law always local." Wills' Gould's Plead., 272-273.

From this state of the law, it follows, first, that **if an action be local, and the facts arose out of the realm, such action cannot be maintained in the English courts,**[8] for, as the *venue in the action* is to be laid truly, there is no county into which, consistently with that rule, the original writ can be directed. But, on the other hand, **if the action be transitory, then, though all the facts arose abroad, the action may be maintained in this country;**[9] because the *venue in the action* may be laid in any English county, at the option of the plaintiff.

The same state of law also leads to the following inference: that, **in a transitory action, the plaintiff may have the action tried in any county that he pleases;** for he may lay the *venue in the action* is to be laid truly, there is no county the venire issues into the county where the *venue in the action* is laid. [339]

And such, accordingly, is the rule, subject only to a check interposed by another regulation, viz., that which relates to the **changing of the venue.** By this practice, when the plaintiff in a transitory action lays a false venue, the defendant is entitled to *move the court to have the venue changed, i. e.,* altered to the right place; and the court, upon affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue, will in most cases grant the application, and oblige the plaintiff to amend his declaration in this particular, unless he, on the other hand, will undertake to give, at the trial, some material evidence arising in the county where the venue was laid.

Whether the action be local or transitory, every local fact alleged in the writ and declaration must still be laid with its true venue, on peril of a variance, if the fact should be brought in issue; **but transitory facts may be laid with any venue, at the choice of the plaintiff; though it is the usual and most proper course to lay all these with the venue in the action.** [340]

As in the writ and declaration, so in the plea and subsequent pleadings, every local fact must be laid with its true venue, under peril of variance; but with respect to **transitory ones,** the rule is, that they **must be laid with the**

8. Wills' Gould's Plead., 271.

9. See the leading case of Mostyn v. Fabrigas, Cowp., 161; 1 Smith's Lead. Cas. *765 and notes.

venue in the action, and even to lay the true place is, in this case, not allowable, if it differ from that venue. And in consequence of the establishment of this rule, it seems now to be held that, **to transitory matters, no venue need now be laid in pleadings subsequent to the declaration**, because, with respect to every matter of this description, the original venue will be taken to be *implied*. [341] In practice, however, it is usual to lay a venue in these as well as in the declaration; and perhaps, in point of strict form, it is the more proper course.

When transitory matters are alleged out of their true place, it seems to be necessary that they should be laid, as the phrase is, under a videlicet, *i. e.*, with the prior intervention of the words "to wit," or "that is to say." **The effect and object of the videlicet** is to mark that the party does not undertake to prove the precise place. And accordingly there is some doubt whether the omission of a videlicet does not occasion a necessity, in the event of a traverse even of a transitory matter, of proving the place alleged. On the other hand, however, it is clear, that **where the place is material, or, in other words, where the matter is local, the use of videlicet will not prevent the necessity of proving the venue laid.**[1] [342]

As to the case **where a local matter, occurring out of the realm, is alleged in the course of the pleading**, it was early decided, that such matter might be tried by a jury from the *venue in the action*. And by way of more effectually preventing objection, a form has long been in use which satisfies the double object of conforming to the true place, and at the same time laying a venue within the realm; the venue of a fact arising abroad being often alleged with a videlicet, under the following form of expression: "In parts beyond the seas, at Fort St. George, in the East Indies" (the real place), "*to wit*, at Westminster, in the county of Middlesex" (the *venue in the action*). [343] This method of laying the true place, with the addition of the venue in the action,

1. See Wills' Gould's Plead., 221-226 and notes, where this subject is fully discussed.

under a videlicet, is usually applied, not only to local facts arising out of the realm, but to those arising *in this country* also, if they happened at a different venue from that *in the action.*[2]

RULE II.

THE PLEADINGS MUST HAVE CERTAINTY OF TIME.

In personal actions, the pleadings must allege the time; that is, the day, month, and year when each traversable fact occurred; and when there is occasion to mention a continuous act, the period of its duration ought to be shown.

The necessity of laying a time, like that of laying a venue, extends to traversable facts only, and therefore no time need be alleged to matter of inducement or aggravation. Wherever it is necessary to lay a venue, it is also necessary to mention time. [344]

As the place, in transitory matters, is considered as forming no material part of the issue, so that one place may be alleged and another proved, **the same law has obtained with respect to time,** in all matters generally. **The pleader, therefore, in general, assigns any time that he pleases to a given fact.** This option, however, is subject to certain **restrictions:** 1. **He should lay the time under a videlicet, if he does not wish to be held to prove it strictly.** 2. **He should not lay a time that is intrinsically impossible, or inconsistent with the fact to which it relates.** A time so laid would, in general, be sufficient ground for demurrer. But, on the other hand, there is no ground for demurrer where such time is laid to a fact not traversable, or where, for any other reason, the allegation of time was unnecessarily made; for an unnecessary statement of time, though impossible or inconsistent, will do no harm, upon the principle that *utile, per inutile, non vitiatur.* Again, 3. **Where time forms a material point in the merits of the case, if a traverse be taken, the time laid is of the substance of the issue, and must be strictly proved,** just as in local matters it is necessary to prove the alleged venue. [345] And here, as in the case of a local fact, the insertion of a videlicet will give no help.[3]

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2. A proper mode of allegation in this country also.

3. "The precise day on which a material fact alleged in the plead-

Where the time needs not to be truly stated (as is generally the case), **the plea and subsequent pleadings should follow the day alleged in the writ and declaration,** and if, in these cases, *no time at all* be laid, the omission is aided, after verdict, or judgment by confession or default, by the operation of the statute of jeofails. [346] **But where, in the plea or subsequent pleadings, the time happens to be material, it must be alleged;** and there (as in the case of a venue to a local fact) the pleader may be obliged to depart from the day in the writ and declaration.

RULE III.

THE PLEADINGS MUST SPECIFY QUALITY, QUANTITY, AND VALUE. [347]

It is, in general, necessary, where the declaration alleges any injury to goods and chattels, or any contract relating

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ings took place, is in most cases immaterial, except when the date of a *record*, or other *writing*, or some other fact, the time of which must be *proved* by a written document, is alleged. For as the day is not an independent *fact*, or substantive matter, but a mere circumstance or accompaniment of such matter; it obviously cannot be in its own nature material, and must therefore be made so, if at all, only by the nature of the fact or matter, in connection with which it is pleaded. If then a tort is stated to have been committed, or a parol contract to have been made, on a particular day; the plaintiff is, in neither case, confined in his proof to the day laid; but may support the allegation, by proving that the wrong was done, or the contract made, on another day — except that, in each case, the day laid in the declaration, and that proved in evidence, must both be prior to the commencement of the suit. And as the plaintiff is not generally confined, in evidence, to the time stated in the *declaration;* so neither is the defendant, when the time on his part is immaterial, confined to that which is laid in his plea. And the same rule obtains throughout the subsequent pleadings. But though a parol contract has, in strictness, no date, and consequently the time of making it is not, *as such*, material; yet if time enters into the *terms* of such a contract, or is involved in any of its essential parts; the true time must be stated, to avoid a *variance*." * * *

"But in pleading any written document—such as a record, specialty, promissory note, bill of exchange, etc., the day, on which it is alleged to bear date is material and must therefore be truly stated: as there will otherwise be a *variance* between the writing itself, and the description of it in the pleading."

to them, that their quality, quantity, and value or price, should be stated.[4] And in any action brought for *recovery of real property,* its *quality* should be shown, as whether it consists of houses, lands, or other hereditaments, and in general it should be stated whether the lands be meadow, pasture, or arable, etc. And the *quantity* of the lands or other real estate must also be specified. So in an action brought for *injuries* to real property, the *quality* should be shown, as whether it consists of houses, lands, or other hereditaments.

Value should be specified in reference to the current coin of the realm, thus: "divers, to wit, three tables of great value, to wit, the value of twenty pounds, of lawful money of Great Britain." [349]

Quantity should be specified by the ordinary measures of extent, weight, or capacity, thus: "divers, to wit, fifty acres of arable land," "divers, to wit, three bushels of wheat."

The rule in question, however, sometimes admits the specification of quality and quantity in a loose and general way. Thus a declaration in trover, for two *packs* of flax and two *packs* of hemp, without setting out the weight or quantity of a pack, is good after verdict, and, as it seems, even upon special demurrer. [350] So a declaration in trover, for a *library* of books, has been allowed, without expressing what they were.[5]

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4. "In actions for injuries to property, whether consisting of personal chattels, or chattels annexed to the realty (as growing crops, etc.), the *value* of the property, or at least *some* value must be alleged. This is required, not strictly as matter of *description,* to identify the property: but because it is incumbent on a plaintiff claiming damages, to show in his declaration the *amount* of the damages which, according to his own statement of the case, he has sustained; and to this end, he is required to allege the *value,* or what he claims to be the value, of the property converted, destroyed or otherwise injured; and thus to furnish (according to his own showing), a *prima facie rule* of damages. But as he is not obliged to state the *true* value; the rule requiring it to be stated would seem to be of no great practical use." Wills' Gould's Plead., 372.

5. "When the subject to be described is supposed to comprehend a *multiplicity* of particulars, a *general* description is sufficient; not only because the plaintiff may probably be

There are also some kinds of action to which the rule requiring specification of quality, quantity, and value, does not apply in modern practice. Thus in actions of **debt** and **indebitatis assumpsit** (where a more general form of declaration obtains than in most other actions), if the debt is claimed in respect of goods sold, etc., the quality, quantity, or value of the goods sold, is never specified.[6] [351] The amount of the debt, or sum of money due upon such sale, must, however, be shown.

As with respect to place and time, so with respect to quantity and value, it is not necessary, when these matters are brought into issue, that the proof should correspond with the averment. The pleader may, in general, allege any quantity and value that he pleases (at least if it be laid under a videlicet), without risk from the variance, in the event of a different amount being proved. **But a verdict cannot, in general, be obtained for a larger quantity or value than is alleged.**

As with respect to place or time, so with respect to quantity or value, there may be instances in which it forms part of the substance of the issue; and there the amount must be strictly proved as laid.

With respect to the allegation of quality, this generally requires to be strictly proved as laid. [352]

RULE IV.

THE PLEADINGS MUST SPECIFY THE NAMES OF PERSONS.

First, **this rule applies to the parties to the suit.**

The original writ and the declaration must both set forth accurately the names of both parties. **The plaintiff must**

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incapable of describing them specifically, but also because a detailed description of them, if practicable, would produce great and inconvenient prolixity in the pleadings."

"And in an action for the loss of goods, by the burning of the plaintiff's house, the goods may be described by the simple denomination of "goods," without any designation of their quantity or kind; and it seems that in such a case, the words "divers goods" would be sufficient." Wills' Gould's Plead., 372.

6. A particular description may be had by application to the court by motion for a bill of particulars.

be described by his Christian name and surname; and if either be mistaken or omitted, it is ground for plea in abatement. **The case is the same with respect to the defendant.**[7] If either party have a **name of dignity,** such as *earl,* etc., he must be described accordingly; and an omission or mistake in such description has the same effect as in the Christian name and surname of an ordinary person.[8] [353]

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7. "The object of this rule is, to prevent mistakes and confusion as to the *identity* of the person sued. A party may, however sue, or be sued, by *any* name by which he is *known and called,* at the commencement of the suit; though it be not his baptismal, or original name. For he may be as fully identified by the former, as by the latter.

Where there are several co-defendants, the true proper name of *each* of them must be given. Describing them, even when sued as partners, by the style or name of the *co-partnership* (as "A. B. & Co.") seems clearly not sufficient. For the name of a copartnership is altogether *arbitrary,* and may not express the proper name of any one of the individual partners.

By the common law, no other personal description of a party, sued or suing, was required, than his proper name (including both his name of baptism, and surname), unless his dignity, or degree, were as high as that of *knight* — in which case, his degree was a necessary *addition* to his proper name: the title of *knight,* and all those above it, being deemed *parcel* of the proper name. And this rule extends to both the plaintiff and the defendant. But the statute of *additions* (1 Hen. 5, c. 5), requires, that in all personal actions, appeals and indictments, there shall be added to the name of the *defendant,* his title, mystery, estate or degree (as "knight" — "gentleman" — "esquire" — "yeoman" — "spinster," etc.), and his place of abode (the town, hamlet, etc.), and the county in which he resides, or has resided. The title, etc., thus added to the defendant's name, is called his "addition;" and the absence of this addition, or the giving of a wrong one, in the writ, is pleadable in abatement. But the addition of the defendant's degree, or mystery, with his present *or* late place of abode is held sufficient. Where there are several co-defendants, the proper addition must be given to *each,* except where husband and wife are co-defendants — in which case the latter requires no addition.

But this statute extends only to *personal* actions, appeals, and indictments. *Real* actions are not within its purview." Wills' Gould's Plead., 438 and notes.

8. In actions of tort the name of the defendant sometimes cannot be obtained in time for the issuance and service of the writ. In such case he may be described as "John Doe whose real name is unknown, but whose person is well known, being" (here describe the person). If the writ is served upon the proper person, if he pleads in abatement, he must give a better writ.

Secondly, **the rule relates to persons not parties to the suit, of whom mention is made in the pleading.**

The names of such persons, viz., the Christian name and surname, or name of dignity, must in general be given; but if not within the knowledge of the party pleading, an allegation to that effect should be made, and such allegation will excuse the omission of name.

A mistake in the name of a party to the suit is ground for plea in abatement only, and cannot be objected as a variance at the trial; but the name of a person not party, is a point on which the proof must correspond with the averment, under peril of a fatal variance.

RULE V.

THE PLEADINGS MUST SHOW TITLE.[9] [354]

When, in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must of course be alleged in the party, or in some other person from whom he derives his authority. **So if a party be charged with any liability,** in respect of property, personal or real, his title to that property must be alleged.

I. **Where a party alleges a title in himself, or in another whose authority he pleads.**

1. **It is often sufficient to allege a title of possession only.**[1]

The form of laying a title of possession, in respect of goods and chattels, is either to allege that they were the "goods and chattels of the plaintiff," or that he was "lawfully possessed of them as of his own property." [355] **With respect to corporeal hereditaments,** the form is, either to allege that the close, etc., was the "close of" the plaintiff, or that he was "lawfully possessed of a certain close," etc. **With respect to incorporeal hereditaments,** a title of possession is generally laid by alleging that the plaintiff was possessed of the corporeal thing, in respect of which the right is claimed, and by reason thereof was entitled to the right

9. Com. Dig., Pleader, 3, n. 9; Bract., 372b, 373b; 1 Chitty's Pl. 367.

1. This is always sufficient as against a mere wrongdoer.

at the time in question; for example, that he "was possessed of a certain messuage, etc., and by reason thereof, during all the time aforesaid, of right ought to have had common of pasture," etc.

A title of possession is applicable, that is, will be sufficiently sustained by the proof, in all cases where the interest is of a present and immediate kind. Thus, when a title of possession is alleged, with respect to *goods and chattels*, the statement will be supported by proof of any kind of *present interest* in them, whether that interest be temporary and special, or absolute in its nature. **So where a title in possession is alleged in respect of corporeal or incorporeal hereditaments, it will be sufficiently maintained by proving any kind of estate in possession,** whether fee simple, fee tail, for life, for term of years, or otherwise. [356] On the other hand, with respect to any kind of property, a title of possession would not be sustained in evidence by proof of an interest in *remainder* or *reversion* only; and, therefore, when the interest is of that description, the preceding forms are inapplicable, and title must be laid in remainder or reversion, according to the fact.

Where a title of possession is *applicable,* the allegation of it is, in many cases, *sufficient,* in pleading, without showing title of a superior kind. The rule on this subject is as follows: **That it is sufficient to allege possession as against a wrong-doer,** or, in other words, that it is enough to lay a title of possession against a person who is stated to have committed an injury to such possession, having, as far as it appears, no title himself.[2]

This rule, as to alleging possession against a wrong-doer, seems not to hold in replevin. [358] For in that action it is held not to be sufficient to state a title of possession, even in a case where it would be allowable in trespass, by virtue of the rule above mentioned.[3]

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2. 1 Chitty's Plead. *368; Wills' Gould's Plead., 19, 37.

3. Hawkins v. Eccles, 2 Bos. & Pull. 359, 361, n. a; per Buller, J., Dovaston v. Payne, H. Bl., 530, 1 Saund. 346 e, n. 2, 2 Saund. 285, n. 3; Saunders v. Hussey, 2 Lutw. 1231, Carth., 9, Ld. Ray., 333, S. C.; but see Adams v. Cross, 2 Vent. 181. See, however, Wills' Gould's Plead., 37; Kelly v. Lewis, 38 Colo. 18; Frank v. Symons, 35 Mont. 56.

This rule has, also, little or no application in real or mixed actions; for in these an injury to the possession is seldom alleged; the question in dispute being, for the most part, on the *right of possession,* or the *right of property.* [359]

Where this rule as to alleging possession against a wrong-doer does not apply, there, though the interest be present or possessory, it is, in general, not sufficient to state a title of possession, but some superior title must be shown.

2. **Where a title of possession is, upon the principles above explained, either not applicable, or not sufficient, the title should, in general, be stated in its full and precise extent.** [360]

Upon this head, two subjects of remark present themselves,— *the allegation of the title itself,* and the statement *of its derivation.*

With respect to the allegation of the title itself, there are certain forms used in pleading, appropriate to each different kind of title, according to all the different distinctions as to *tenure, quantity of estate, time of enjoyment,* and *number of owners.*[4]

With respect to the derivation of the title, there is a leading distinction, on this subject, between *estates in fee simple* and *particular estates.* [361]

In general, it is sufficient to state a seisin in fee simple per se; that is, simply to state (according to the usual form of alleging that title) that the party was "seised in his demesne as of fee of and in a certain messuage," &c., **without showing the derivation,** or (as it is expressed in pleading) the *commencement* of the estate. So though the fee be *conditional* or *determinable* on a certain event, yet a seisin in fee may be alleged, without showing the commencement of the estate.[5]

However, it is sometimes necessary to show the derivation of the fee; viz., **where, in the pleading, the seisin has already been alleged in another person, from whom the present party claims.** [362] In such case it must, of course, be

4. See 2 Chitty's Plead. (1st Ed.), 554, 573.

5. See Wills' Gould's Plead., 22 and notes.

shown how it passed from one of these persons to the other.

With respect to particular estates, the general rule is that the commencement of particular estates must be shown.[6] If, therefore, a party sets up in his own favor an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement, that is, from the last seisin in fee simple; and if derived by alienation or conveyance, the substance and effect of such conveyances should be precisely set forth. [363]

To the rule *that the commencement of particular estates must be shown,* there is this **exception, that it need not be shown where the title is alleged by way of inducement only.**[7] [364]

On the subject of the *derivation of title,* the following **additional rules** may be collected from the books: —

First, **where a party claims by inheritance, he must, in general, show how he is heir,** viz., as son or otherwise,[8] *and if he claims by mediate, not immediate, descent, he must show the pedigree;* **for example, if he claims as nephew, he must show how nephew.**[9] [365]

Secondly, **where a party claims by conveyance or alienation, the nature of the conveyance or alienation must, in general, be stated;** as whether it be by devise, feoffment, etc.

Thirdly, the nature of the conveyance or alienation should be stated according to its legal effect rather than its form of words.

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6. Co. Litt., 303 b; Scilly v. Dally, 2 Salk. 562, Carth., 444, S. C.; Searl v. Bunnion, 2 Mod. 70; Johns v. Whitley, 3 Wils. 72; Hendy v. Stephenson, 10 East. 60, Rast. Ent., 656, and the case of title derived from the king is no exception. 1 Saund. 186 d, n. 1.

7. Com. Dig., Pleader, E. 19, C. 43; Blockley v. Slater, Lutw., 120; Searl v. Bunnion, 2 Mod. 70; Silly v. Dally, Carth., 444; Skevill v. Avery, Cro. Car., 138; Lodge v. Frye, Cro. Jac., 52; Adams v. Cross, 2 Vent. 181; Wade v. Baker, Ld. Ray., 130.

8. Denham v. Stephenson, 1 Salk. 355; The Duke of Newcastle v. Wright, 1 Lev. 190, 1 Ld. Raym. 202.

9. Dumsday v. Hughes, 3 Bos. & Pull. 453; Blackborough v. Davis, 12 Mod. 619; and see Roe v. Lord, 2 Black. Rep. 1099, and the cases there cited.

Fourthly, **where the nature of the conveyance is such that it would, at common law, be valid without deed or writing, there no deed or writing need be alleged in the pleading, though such document may in fact exist; but where the nature of the conveyance requires, at common law, a deed or other written instrument, such instrument must be alleged.** [367]

There is one case, however, in which a deed is usually alleged in pleading, though not necessary, at common law, to the conveyance, and which, therefore, in practice at least, forms an **exception** to the above rule. [368] For **in making title under a lease for years by indenture, it is usual to plead the indenture,**[1] though the lease was good at common law by parol, and needs to be in writing only where the term is of more than three years' duration, and then only by the statute of frauds.

On the other hand, in the case where a demise by husband and wife is pleaded, it seems that it is not necessary to show that it was by deed; and yet the lease, if without deed, is at common law void as to the wife, after the death of the husband, and is not within the stat. 32 Hen. VIII., c. 28, sect. 1, which gives efficacy to leases by persons having an estate in right of their wives, etc., only where such leases are "by writing indented, under seal." The reason seems to be that a lease by husband and wife, though without deed, is good during the life of the husband.[2]

Thus far with respect to the allegation of title, in its *full and precise extent*. Another mode, however, of laying title, still remains to be considered.

3. **Where a title of possession is inapplicable or insufficient, it is not always necessary to allege the title in its full and precise extent**; for in lieu of this it is occasionally sufficient to allege what may be called a **general freehold title.** [369] In a plea in trespass quare clausum fregit, or an avowry in replevin, if the defendant claim an estate of freehold in the locus in quo, he is allowed to plead generally

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1. 2 Chitty's Plead. (1st Ed.), 555.

2. 2 Saund. 180 a, n. 9; Wiscot's Case, 2 Rep. 61 b; Bateman v. Allen, Cro. Eliz., 438; Childes v. Wescot, ibid 482, Dyer, 91 b.

that the place is his "*close, soil, and freehold.*" This is called the plea or avowry of **liberum tenementum.**[3]

This allegation of a general freehold title will be sustained by proof of any estate of freehold, whether in fee, in tail, or for life only, and whether in possession or expectant on the determination of a term of years. [370] But it does not apply to the case of a freehold estate in remainder or reversion, expectant on a particular estate of freehold, nor to copyhold tenure.

The plea of avowry of liberum tenementum is the only case of usual occurrence in modern practice in which the allegation of a *general freehold title,* in lieu of a *precise* allegation of title, is sufficient.

In alleging a general freehold title, it is not necessary to show its commencement.

II. **Where a party alleges title in his adversary.** [371] The rule on this subject appears in general to be, *that* **it is**

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3. "Although a special plea, alleging the *possessory title* to be in the defendant, and not giving color, is ill, as amounting to the general issue, in trespass *quare clausum fregit;* yet the plea of *liberum tenementum* (that the *locus in quo* was the defendant's freehold), has, by a long series of authorities, ancient and modern, been sanctioned, as a good special plea in that action, though it never gives color." Wills' Gould's Plead., 520.

"FORM OF PLEA OF LIBERUM TENEMENTUM, IN TRESPASS QUARE CLAUSUM FREGIT.

And for a further plea in this behalf, as to the breaking and entering the said close, in which, &c., in the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming, and spoiling the grass and herbage then and there growing, the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A B* ought not to have and maintain his aforesaid action thereof against him, because, he says, that the said close, in the said declaration mentioned, and in which, &c., now is, and at the said several times when, &c., was the close, soil, and freehold of him, the said *C D*. Wherefore he, the said *C D*, at the said several times, when, &c., broke and entered the said close, in which, &c., and with feet in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage then and there growing, as he lawfully might, for the cause aforesaid, which are the same trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained; and this the said *C D* is ready to verify. Wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him. 2 Chitty's Plead. (1st Ed.), 551.

not necessary to allege title more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim.

To answer the purpose of showing a liability in the party charged, it is, in most cases, sufficient to allege a title of possession, the forms of which are similar to those in which the same kind of title is alleged in favor of the party pleading.

A title of possession, however, cannot be sustained in evidence, except by proving some present interest in chattels or actual possession of land. If, therefore, the interest be by way of reversion or remainder, it must be laid accordingly, and the title of possession is *inapplicable.* So there are cases in which to charge a party with mere possession would not be *sufficient* to show his liability. [372] Thus in declaring against him in debt for rent, as assignee of a term of years, it would not be sufficient to show that he was possessed, but it must be shown that he was posssessed as assignee of the term.

Where a title of possession is thus inapplicable or insufficient, and some other or superior title must be shown, it is yet not necessary to allege the title of an adversary with as much precision as in the case where a party is stating his own, and it seems sufficient that it be laid fully enough to show the liability charged. Therefore, though it is the rule, with respect to a man's own title, *that the commencement of particular estates should be shown,* unless alleged by way of *inducement,* yet in pleading the title of an adversary, it seems that this is, in general, not necessary. So in cases where it happens to be requisite to show whence the adversary derived his title, this may be done with less precision than where a man alleges his own. **And, in general, it is sufficient to plead such title by a que estate;** that is, to allege that the opposite party has the same estate, or that the same estate is vested in him, as has been precedently laid in some other person, without showing in what manner the estate passed from the one to the other.[4] [373]

4. As to making title by a *que estate,* see the Atorney General v. Meller, Hardr., 459; Doct. Pl., 302; Com. Dig., Pleader, E. 23, E. 24; Co. Litt., 121 a.

The title shown, both where it is laid in the party himself, or the person whose authority he pleads, and where it is laid in his adversary, must, in general, when issue is taken upon it, be strictly proved. [374]

The rule which requires that title should be shown, is subject to the **exception** that **no title need be shown where the opposite party is estopped from denying the title.** [375]

RULE VI.

THE PLEADINGS MUST SHOW AUTHORITY. [377]

In general, when a party has occasion to justify under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his pleading. And he ought also to show that he has substantially pursued such authority.[5]

In all cases where the defendant justifies under judicial process, he must set it forth particularly in his plea, and it is not sufficient to allege *generally* that he committed the act in question by virtue of a certain writ or warrant directed to him. [378] But on this subject there are some important **distinctions as to the degree of particularity** which the rules of pleading in different cases require: 1. **It is not necessary that any person justifying under judicial process should set forth the cause of action in the original suit** in which that process issued.[6] 2. **If the justification be by the officer executing the writ, he is required to plead such writ only, and not the judgment on which it was founded. But if the justification be by a party to the suit, or by any stranger, except an officer, the judgment, as well as the writ, must be set forth.**[7] [379] 3. **Where it is an officer who**

5. "Regularly, whensoever a man doth anything by force of a warrant or authority, he must plead it." Co. Litt., 283 a; ibid, 303 b; Com. Dig., Pleader, E. 17; 1 Saund. 298, n. 1; Lamb v. Mills, 4 Mod. 377; Matthews v. Cary, 3 Mod. 137; Carth., 73, S. C.; Collet v. Lord Keith, 2 East. 260; Selw., N. P. 826.

6. Rowland v. Veale, Cowp., 18; Belk v. Broadbent, 3 T. R. 183; 1 Saund. 92, n. 2.

7. Per Holt, C. J., Britton v. Cole, Carth., 443; 1 Salk. 408, S. C.; Turner v. Felgate, 1 Lev. 95; Cotes v. Michill, 3 Lev. 20; per De Grey, C. J., Barker v. Braham, 3 Wils. 368. But in Britton v. Cole, 1 Salk. 408, it is

justifies, he must show that the writ was returned, if it was such as it was his duty to return, and all mesne process is of that description. But in general a writ of execution need not be returned, and therefore no return of it need in general be alleged.[8] However, it is said that, "if any ulterior process in execution is to be resorted to, to complete the justification, there it may be necessary to show to the court the return of the prior writ, in order to warrant the issuing of the other." Again, there is a **distinction as to this point between a principal and a subordinate officer:** "The former shall not justify under the process unless he has obeyed the order of the court in returning it; otherwise it is of one who has not the power to procure a return to be made." 4. **Where it is necessary to plead the judgment, that may be done (if it was a judgment of a superior court) without setting forth any of the previous proceedings in the suit.** [380] 5. **Where the justification is founded on process issuing out of an inferior English court,** or (as it seems) a court of foreign jurisdiction, **the nature and extent of the jurisdiction of such court ought to be set forth, and it ought to be shown that the cause of action arose within that jurisdiction,** though a justification founded on process of any of the superior courts need not contain such allegations. And in pleading a judgment of inferior courts the previous proceedings are, in some measure, stated. But it is allowable to set them forth with a *taliter processum est;* thus, that *A B,* at a certain court, etc., held at, etc., levied his plaint against *C D,* in a certain plea of trespass on the case, or debt, etc. (as the case may be), for a cause of action arising within the jurisdiction, and *thereupon such proceedings were had,* that afterwards, etc., it was considered by the said court that the said *A B* should recover against the said *C D,* etc.

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said that the court "seemed to hold that, if one comes in aid of the officer at his request, he may justify as the officer may do." See Morse v. James, 122. See Cooley on Torts (Students' Ed.), 161.

8. Middleton v. Price, Str., 1184, 1 Wils. 17, S. C.; Cheasley v. Barnes, 10 East. 73; Rowland v. Veale, Cowp., 18; Hoe's Case, 5 Rep. 90; 1 Saund. 92, n. 2.

Notwitstanding the general rule under consideration, **it is allowable, where an authority may be constituted verbally and generally, to plead it in general terms.**

The allegation of authority, like that of title, must in general be strictly proved as laid. [381]

The above-mentioned particulars of *place, time, quality, quantity,* and *value, names of persons, title,* and *authority,* though in this work made the subject of distinct rules, in a view to convenient classification and arrangement, are to be considered but as examples of that infinite variety of circumstances, which it may become necessary, in different cases and forms of action, to particularize, for the sake of producing a certain issue; for it may be laid down as a **comprehensive rule,** that —

RULE VII.

IN GENERAL, WHATEVER IS ALLEGED IN PLEADING, MUST BE ALLEGED WITH CERTAINTY.[9]

In pleading the performance of a condition or covenant, it is a rule, though open to exceptions that will be presently noticed, that **the party must not plead generally that he**

9. "*Degrees of Certainty.*— Certainty in pleading is, according to Lord Coke, of three sorts or degrees, viz.: 'Certainty to a *common* intent' —'certainty to a *certain intent in general* — and certainty to a *certain* intent in *every particular.*' These degrees, which it would be difficult to distinguish by exact logical definitions, have been sometimes treated as idle and unintelligible refinements. It seems, different degrees of certainty (however they may be agreed, however, by all common-law jurists, that they are denominated), are required for different kinds or classes of pleas: And the objection to Lord Coke's denominations of them is not, that the law does not recognize *any* distinction, in respect to the requisite degree of certainty in different branches of pleading; but that the language, in which he has endeavored to express the distinction, is not sufficiently precise and intelligible, to convey any very definite notion of it. The objection thus understood, is undoubtedly well founded; but we are not, for this reason, to discard all distinction between different degrees of certainty in pleading: since such degrees are not only recognized in legal theory; but practically observed, to a certain extent at least, in all the authoritative precedents. Without attempting, however, to frame exact legal definitions of these different degrees of certainty (which — as they

performed the covenant or condition, but must show specially the time, place, and manner of performance; and even though the subject to be performed should consist of several different acts, yet he must show in this special way the per-

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are merely *relative*, and referable to no fixed standard — would seem impossible) — it may suffice, perhaps, to present the following general explanation of them.

The First Degree of Certainty in Lord Coke's enumeration, and which he denotes 'certainty to a *common* intent,' is the lowest which the rules of pleading in any instance allow. This degree is sufficient only in pleas in *bar*, *rejoinders*, and such other pleadings, on the part of the *defendant*, as go to *the action;* but not in *dilatory* pleas.

The Second Degree, or 'certainty to a *certain intent in general*,' is higher than the former, and is required in *counts*, *replications*, and other pleadings on the part of the *plaintiff;* as also in *indictments* and *informations;* it being deemed reasonable, that such pleadings as assert a *charge*, either criminal or civil, against the adverse party, should be construed with greater strictness, than those which state his *defence* or *excuse*. More precise explanations of these two degrees of certainty have, however, been attempted. Thus, Mr. Justice Buller observes, 'By a *common* intent I understand, that when words are used, which will bear a *natural* sense, and also an *artificial* one, or one to be made out by *argument* or *inference*, the *natural* sense shall prevail. It is simply a rule of *construction*, and not of *addition: Common* intent cannot *add* to a sentence words which are omitted.' But where 'certainty to a *certain* intent in *general*' is required, if words are used which will bear these two senses, they may be taken, it seems, *either* way against the *party pleading;* though as against the *adverse* party, they can be understood only in their *natural* sense: so that if *either* sense will operate *against* the pleader, his pleading is defective. The same distinguished judge again observes, that by the second degree of certainty is meant, 'what, upon a fair and reasonable construction, may be called certain, *without recurring to possible facts, which do not appear;*' i. e. without denying, or avoiding by *anticipation*, possible facts, which may operate against him; and on the other hand, without the aid of any supposable facts or circumstances, not alleged by him.

Certainty of the Third Sort, or 'to certain intent in *every particular*,' requires the utmost fullness and *particularity* of statement, as well as the highest attainable accuracy and precision—leaving, on the one hand, nothing to be supplied by intendment or construction; and on the other, no supposable special answer unobviated. The rule, requiring this degree of certainty, is a rule not of 'construction' only, but also of '*addition;*' i. e. it requires the pleader, not only to answer fully what is necessary to be *answered;* but also to *anticipate* and exclude all such supposable matter, as would, if alleged on the opposite side, *defeat* his plea. This last requisite affords a clear and marked distinction between this, and the two for-

formance of each.[1] [382] Thus in debt on bond, conditioned for the payment of £30 to *H S, I S,* and *A S, tam cito* as they should come to the age of twenty-one years, the defendant pleaded that he paid those sums *tam cito* as they came of age, and the plaintiff demurred, because it was not shown when they came of age, and the certain times of the payment. And for this cause all the court held the plea to be ill.[2]

Yes this rule, requiring performance to be specially shown, **admits of relaxation where the subject comprehends such multiplicity of matter as would lead to great prolixity;** and a more general mode of allegation is in such cases allowable. [383] It is open also to the following **exceptions: Where the condition is for the performance of matters set forth in another instrument, and these matters are in an affirmative and absolute form,** and neither in the negative nor the disjunctive, a general plea of performance is sufficient. And where a bond is conditioned for indemnifying the plaintiff from the consequences of a certain act, a general plea of *non damnificatus,* viz., that he has not been damnified, is proper, without showing how the defendant has indemnified him.

When in any of these excepted cases, however, a general

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mer kinds of certainty. For in those two, nothing more is necessary, in general, than to answer fully the substance of what is *actually affirmed* by the adverse party — or at most to make out a claim or defence, *prima facie* sufficient; without anticipating other matters, not already appearing in the pleadings, but which may possibly be alleged in reply.

This third and highest degree of certainty is required only in such pleas as are *odious* or *unfavorably* regarded in the law, viz.: pleas in *estoppel,* and *dilatory* pleas. The former are so regarded because their effect is to preclude the adverse party from averring even *the truth,* if inconsistent with the *estoppel* pleaded: and the latter, because their object is to defeat suits upon grounds unconnected with their *merits.*". Wills' Gould's Plead., 35-38 and notes.

1. Com. Dig., Pleader, E. 25, E. 26, 2 W. 33; Halsey v. Carpenter, Cro. Jac., 359; Wimbleton v. Holdrip, 1 Lev. 303; Woodcock v. Cole, 1 Sid. 215; Stone v. Bliss, 1 Bulst. 43; Fitzpatrick v. Robinson, 1 Show. 1; Austin v. Jervoise, Hob., 69, 77; Brown v. Rands, 2 Vent. 156; Lord Evers v. Buckton, Benl., 65; Braban v. Bacon, Cro. Eliz., 916; Codner v. Dalby, Cro. Jac., 363; Leneret v. Rivet, ibid, 503; 1 Saund. 116, n. 1.

2. Halsey v. Carpenter, *supra.*

plea of performance is pleaded, the rule under discussion still requires the plaintiff to show particularly in his replication in what way the covenant or condition has been broken; for otherwise no sufficiently certain issue would be attained.[3] [384]

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3. When in any of these excepted cases, however, a general plea of performance is pleaded, the rule under discussion still requires the *plaintiff* to show particularly in his replication in what way the covenant or condition has been *broken;* for otherwise no sufficiently certain issue would be attained. Thus, in an action of debt on a bond, conditioned for performance of affirmative and absolute covenants contained in a certain indenture, if the defendant pleads generally (as in that case he may) that he performed the covenants according to the condition, the plaintiff cannot in his replication tender issue with a mere traverse of the words of the plea, viz., that the defendant did not perform any of the covenants, etc., for this issue would be too wide and uncertain; but he must assign a breach, showing specifically in what particular, and in what manner.

Not only on the subject of *performance,* but in a variety of other cases, the books afford illustration of this general rule.

Thus, in debt on bond, the defendant pleaded that the instrument was executed in pursuance of a certain corrupt contract, made at a time and place specified, between the plaintiff and defendant, whereupon there was reserved above the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the statute in such case made and provided. To this plea there was a demurrer, assigning for cause, that the particulars of the contract were not specified, nor the time of forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance. And the court held that the plea was bad, for not setting forth particularly the corrupt contract and the usurious interest; and Bayley, J., observed, that he "had always understood that the party who pleads a contract must set it out, if he be a party to the contract." Hill v. Montague, 2 M. & S. 377; Hinton v. Roffey, 3 Mod. 35.

So an action on the case for a libel, imputing that the plaintiff was connected with swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, the defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions. To this plea there was a special demurrer, assiging for cause, *inter alia,* that the plea did not state the *particular instances of fraud;* and though the court of common pleas gave judgment for the defendant, this judgment was afterwards reversed upon writ of error, and the plea adjudged to be insufficient, on the ground above mentioned. J'Anson v. Stuart, 1 T. R. 748.

With respect to all points on which certainty of allegation is required, in general the allegation, when brought into issue, requires to be proved, in substance, as laid; and the relaxation from the ordinary rule on this subject, which is allowed with respect to *place, time, quantity, and value,* does not, generally speaking, extend to other particulars. [388]

Such are the principal rules which tend to certainty, but these receive considerable **limitation and restriction** from some other **rules of a subordinate kind**; thus:—

1. **It is not necessary in pleading to state that which is merely matter of evidence.**[4] In other words, it is not necessary, in alleging a fact, to state such circumstances as merely tend to prove the truth of the fact.

2. **It is not necessary to state matter of which the court takes notice ex officio.** [391]

Therefore it is **unnecessary to state matter of law** [whether it be common law or public statute law]. [392] For this the judges are bound to know, and can apply for themselves to the facts alleged.[5] **The case, however, of private acts of parliament is different**; for these the court does not officially notice.[6]

Though, however, it is in general unnecessary to allege **matter of law,** yet **there is sometimes occasion to make mention of** it, for the conveniencce or intelligibility of the statement of fact. [393] So it is sometimes necessary to refer to a public statute in general terms, to show that the case is intended to be brought within the statute; as, for example, to allege that the defendant committed a certain act against the *form of the statute in such case made and provided;* but the reference is made in this general way only, and there is no need to set the statute forth.

Besides points of *law,* **there are many other matters of a**

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4. "Evidence shall never be pleaded, because it tends to prove matter in fact; and therefore the matter in fact shall be pleaded." Dowman's Case, 9 Rep. 9 b, and see 9 Ed. III, 5 b, 6 a, there cited; Eaton v. Southby, Willes, 131; Jermy v. Jenny, Raym., 8; Groenvelt v. Burnell, Carth., 491. See, also, 18 Ed. II, 614, where the pleader objects to an allegation, *ceon'est forsque un evidence a l'enqueste.*

5. Wills' Gould's Plead., 202, note.

6. So of municipal ordinances and foreign statutes. Id.

public kind, of which the court takes official notice, and with respect to which, it is, for the same reason, unnecessary to make allegation in pleading: such as **matters antecedently alleged in the same record, the time of the king's accession, his proclamations, his privileges, the time and place of holding parliament, the time of its sessions and prorogations, and its usual course of proceeding; the ecclesiastical, civil, and maritime laws; the customary course of descent in gavel-kind, and borough-English tenure; the course of the almanac, the division of England into counties, provinces, and dioceses; the meaning of English words, and terms of art (even when only local in their use); legal weights and measures, and the ordinary measurement of time; the existence and course of proceeding of the superior courts at Westminster, and the other courts of general jurisdiction; and the privileges of the officers of the courts at Westminster.** [395]

3. **It is not necessary to state matter which would come more properly from the other side.**[7]

The meaning of this rule is that it is not necessary to anticipate the answer of the adversary. **It is sufficient that each pleading should, in itself, contain a good prima facie case,** without reference to possible objections not yet urged. But where the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side. [397]

There is an **exception** to the rule in question, in the case of certain pleas, which are regarded unfavorably by the courts, as having the effect of excluding the truth. Such are **all pleadings in estoppel,**[8] and the plea of **alien enemy.**[9] [398] It is said that **these must be certain in every particular**; which seems to amount to this, that they must meet

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7. Com. Dig., Pleader, C. 81; Stowell v. Ld. Zouch, Plow., 376; St. John v. St. John, Hob., 78; Hotham v. East India Co., 1 T. R. 638.

8. Co. Litt., 352 b, 303 a; Dovaston v. Payne, 2 H. Bl. 530.

9. Wills' Gould's Plead., 422. See note next *supra*.

and remove by anticipation, every possible answer of the adversary.

4. **It is not necessary to allege circumstances necessarily implied.**[1]

5. **It is not necessary to allege what the law will presume.**[2] [399]

6. **A general mode of pleading is allowed where great prolixity is thereby avoided.**[3] [400]

7. **A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to certainty.**[4] [403]

This rule comes into most frequent illustration in pleading **performance, in actions of debt on bond.** The general rule as to certainty requires that the time, place, and manner of such performance should be specially shown. [404] Nevertheless, by virtue of the rule now under consideration, it may be sometimes alleged in general terms only; and the requisite certainty of issue is in such cases secured by throwing on the plaintiff the necessity of showing a special breach in his replication.[5] This course, for example, is allowed in cases where a more special form of pleading would lead to inconvenient prolixity.

Another illustration is afforded by the plea of **non damnificatus,** on an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," etc. [405]

The rule under consideration is also exemplified in the case where the condition of a bond is for **performance of covenants, or other matters, contained in an indenture, or**

1. Vynior's Case, 8 Rep. 81 b; Bac. Ab., Pleas, etc., I. 7; Com. Dig., Pleader, E. 9; Co. Litt., 303 b; 2 Saund. 305 a, n. 13; Reg. Plac., 101; Sheers v. Brooks, 2 H. Bl. 120; Hanford v. Palmer, 2 Brod. & Bing. 361; Marsh v. Bulteel, 5 Barn. & Ald. 507.

2. Wilson v. Holiday, 4 M. & S. 125; Chapman v. Pickeringill, 2 Wils. 147; 1 Chitty (1st Ed.), 226.

3. Cornwallis v. Savery, 2 Burr. 772; Aglionby v. Towerson, Raym., 400.

4. Co. Litt., 303 b; Mints v. Bethil, Cro. Eliz., 749; 1 Saund. 117, n. 1; 2 Saund. 410, n. 3; Church v. Brownwick, 1 Sid. 334.

5. Mints v. Bethil, Cro. Eliz., 749; and see Church v. Brownwick, 1 Sid. 334.

other instrument collateral to the bond, and not set forth in the condition. [407] In this case, also, the law often allows a general plea of performance, without setting forth the manner.[6]

But the adoption of a mode of pleading so general will be improper where the covenants, or other matters mentioned in the collateral instrument, are either in the *negative* or the *disjunctive* form, and with respect to such matters the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument.[7] [409] And the case is the same where the matters mentioned in the collateral instrument are in the *disjunctive or alternative* form; as where the defendant engages to do either one thing or another.[8] [410] Here, also, a general allegation of performance is insufficient; and he should show which of the alternative acts was performed.

In pleading performance, therefore, of the condition of a bond, where (as is generally the case) the plaintiff has stated in his declaration nothing but the bond itself, without the condition, it is necessary for the defendant to demand oyer of the condition, and set it forth. [411] And in pleading performance of matters contained in a *collateral* instrument, it is necessary not only to do this, but also to make profert, and set forth the whole substance of the collateral instrument; for otherwise it will not appear that that instrument did not stipulate for the performance of negative or disjunctive matters, and in that case the general plea of performance of the matters therein contained would (as above shown) be improper.

8. **No greater particularity is required than the nature of the thing pleaded will conveniently admit.**[9]

Thus, though generally in an action for injury to goods,

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6. Mints v. Bethil, Cro. Eliz., 749; Bac. Ab., Pleas, etc., I, 3; 2 Saund. 410, n. 3; 1 Saund. 117, n. 1; Com. Dig., Pleader, 2, V. 13; Earl of Kerry v. Baxter, 4 East. 340.

7. Earl of Kerry v. Baxter, *supra*.

8. Oglethorpe v. Hyde, Cro. Eliz., 233.

9. Bac. Ab., Pleas, etc., B. 5, 5, and p. 409, 5th ed.; Buckley v. Rice Thomas, Plow., 118; Wimbish v. Tailbois, 54; Partridge v. Strange, 85; Plow., 118, 54, 85; Hartley v. Herring, 8 T. R. 130.

the *quantity* of the goods must be stated, yet, if they cannot, under the circumstances of the case, be conveniently ascertained by number, weight, or measure, such certainty will not be required. [412]

9. **Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.**[1] [414]

The rule is exemplified in the case of alleging title in an adversary, where (as formerly explained) a more general statement is allowed than when title is set up in the party himself.

10. **Less particularity is necessary in the statement of matter of inducement, or aggravation, than in the main allegation.**[2] [416]

This rule is exemplified in the case of the derivation of title; where, though it is a general rule *that the commencement of a particular estate must be shown*, yet an exception is allowed if the title be alleged by way of *inducement* only.

11. **With respect to acts valid at common law, but regulated, as to the mode of performance, by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute.**[3] [417]

On this subject the following difference is to be remarked, that "**where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act**; as in the case of a will of lands, it must be alleged to have been made in writing; **but where an act makes writing necessary to a matter, where it was not so at the common law,** as where a

1. Rider v. Smith, 3 T. R. 766; Derisley v. Custance, 4 T. R. 77; Attorney General v. Meller, Hard., 459; Denham v. Stephenson, 1 Salk. 355; Robert Bradshaw's Case, 9 Rep. 60 b; Gale v. Read, 8 East. 80; Com. Dig., Pleader, C. 26.

2. Co. Litt., 303 a; Bac. Ab., Pleas, etc., pp. 322, 348, 5th ed.; Com. Dig., Pleader, C. 31, C. 43, E. 10, E. 18; Doct. Pl., 283; Wetherell v. Clerkson, 12 Mod. 597; Chamberlain v. Greenfield, 3 Wils. 292; Alsope v. Sytwell, Yelv., 17; Riggs v. Bullingham, Cro. Eliz., 715; Woolaston v. Webb, Hob., 18; Bishop of Salisbury's Case, 10 Rep. 59 b; 1 Saund. 374, n. 1.

3. 1 Saund. 276, n. 2; 211, n. 2; Anon., 2 Salk. 519; Birch v. Bellany, 12 Mod. 540.

lease for a longer term than three years is required to be in writing by the statute of frauds, **it is not necessary to plead the thing to be in writing,** though it must be proved to be so in evidence." [418]

As to the rule under consideration, however, **a distinction has been taken between a declaration and a plea;** and it is said that though in the former the plaintiff need not show the thing to be in writing, in the latter the defendant must.[4]

SECTION V.

OF RULES WHICH TEND TO PREVENT OBSCURITY AND CONFUSION IN PLEADING. [420]

RULE I.

PLEADINGS MUST NOT BE INSENSIBLE NOR REPUGNANT.[5]

First, if a pleading be **unintelligible** (or, in the language of pleading, *insensible*) by the omission of material words, etc., this vitiates the pleading.[6]

Again, if a pleading be **inconsistent with itself,** or *repugnant,* this is ground for demurrer. But there is this **exception:** that, if the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering the general sense and effect, it shall in that case be rejected, at least, if laid under a videlicet, and shall not vitiate the pleading; for the maxim is, *utile, per inutile, non vitiatur.*[7] [421]

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4. Case v. Barber, Raym., 450. It is to be observed, that the plea was at all events a bad one in reference to the first objection. The case is, perhaps, therefore, not decisive as to the validity of the second.

5. Com. Dig., Pleader, C. 23; Wyat v. Aland, 1 Salk. 324; Bac. Ab., Pleas, etc., I. 4; Nevill v. Soper, 1 Salk. 213; Butt's Case, 7 Rep. a; Hutchinson v. Jackson, 2 Lut. 1324; Vin. Ab., Abatement, D. a.

6. Com. Dig., Pleader, C. 23; Wyat v. Aland, 1 Salk. 324.

7. Gilb., C. P., 131-2; The King v. Stevens, 5 East. 255; Wyat v. Aland, 1 Salk. 324-5; 2 Saund. 291, n. 1; 306, n. 14; Co. Litt., 303 b.

RULE II.

PLEADINGS MUST NOT BE AMBIGUOUS, OR DOUBTFUL, IN MEANING; AND WHEN TWO DIFFERENT MEANINGS PRESENT THEMSELVES, THAT CONSTRUCTION SHALL BE ADOPTED WHICH IS MOST UNFAVORABLE TO THE PARTY PLEADING.[8]

A pleading, however, is not objectionable as ambiguous or obscure, if it be certain to a common intent,[9] that is, if it be clear enough, according to reasonable intendment or construction, though not worded with absolute precision. [423]

A negative pregnant is such a form of negative expression as may imply, or carry within it, an affirmative.[1] [424]

This is considered as a fault in pleading; and the reason why it is so considered is, that the meaning of such a form of expression is ambiguous.

In trespass, for entering the plaintiff's house, the defendant pleaded, that the plaintiff's daughter gave him license to do so; and that he entered by that license. The plaintiff replied, that *he did not enter by her license.* This was considered as a *negative pregnant;* and it was held, that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together.[2] It will be observed that this form of traverse may imply, or carry within it, that a license was given, though the defendant did not enter by that license. It is, therefore, in the language of pleading, said to be pregnant with that admission, viz., that a license was given.[3] At the same time, the license is not expressly admitted; and the effect, therefore, is to leave it in

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8. Co. Litt., 303 b; Purcell v. Bradley, Yelv., 36; Rose v. Standen, 2 Mod. 295; Dovaston v. Payne, 2 H. Bl. 530; Thornton v. Adams, 5 M. & S. 38; Lord Huntingtower v. Gardiner, 1 Barn. & Cres. 297; Fletcher v. Pogson, 3 Barn. & Cres. 192.

9. Long's Case, 5 Rep. 121 9; Jacobs v. Nelson, 3 Taunt. 423. "Certain" means here clear and distinct.

1. See Wills' Gould's Plead., 167, 488-495.

"The same principles are applicable to *affirmatives* pregnant. The following may be taken as an example of such an allegation: if to an action of assumpsit, which is barred by the statute of limitations in *six* years, the defendant pleads that he did not undertake, etc., within *ten* years, a replication that he did undertake, etc., "within ten years," would be an *affirmative pregnant:* since it would impliedly admit that the defendant had *not* promised within six years. And as no proper issue could be tendered upon such a plea, the plaintiff should, for that reason, *demur* to it." Id., 494-495.

2. Myn v. Cole, Cro. Jac., 87.

3. Bac. Ab., Pleas, etc., p. 420, 5th ed.

doubt whether the plaintiff means to deny the license or to deny that the defendant entered by virtue of that license. It is this *ambiguity* which appears to constitute the fault.[4]

This rule, however, against a negative pregnant appears in modern times, at least, to have received no very strict construction. [425]

RULE III.

PLEADINGS MUST NOT BE ARGUMENTATIVE.[5] [426]

In other words, they must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only.

It is a branch of this rule *that* **two affirmatives do not make a good issue.** [428] The reason is, that the traverse by the second affirmative is argumentative in its nature. Thus if it be alleged by the defendant that a party died seised in fee, and the plaintiff allege that he died seised in tail, this is not a good issue.[6] The doctrine, however, that two affirmatives do not make a good issue, is not taken so strictly but that the issue will, in some cases, be good, if there is sufficient negative and affirmative in *effect*, though in the *form of words* there be a double affirmative. [429] Thus in debt on a lease for years, where the defendant pleaded that the plaintiff had nothing at the time of the lease made, and the plaintiff replied that he was seised in fee, this was held a good issue.[7]

Another branch of the rule against argumentativeness is, *that* **two negatives do not make a good issue.**[8] Thus if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected so to do,

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4. 28 Hen. VI, 7; Slade v. Drake, Hob., 295; Styles' Pract. Reg., title Negative Pregnant.

5. Bac. Ab., Pleas, etc., I. 5; Com. Dig., E. 3; Co. Litt., 303 a; Dyer, 43 a; Wood v. Butts, Cro. Eliz., 260; Ledeshan v. Lubram, ibid. 870; Blackmore v. Tidderley, 11 Mod. 38; 2 Salk. 423, S. C.; Murray v. East India Company, 5 Barn. & Ald. 215.

6. Doct. Pl., 349; 5 Hen. VII, 11, 12.

7. Co. Litt., 126 a; Reg. Plac., 297, 298; and see Tomlin v. Burlace, 1 Wils. 6.

8. Com. Dig., Pleader, R. 3.

the plaintiff cannot reply that *he did not neglect and refuse to deliver* such abstract, but should allege affirmatively that *he did deliver*.[9]

RULE IV.

PLEADINGS MUST NOT BE IN THE ALTERNATIVE.[1] [430]

Thus in an action of debt against a jailer for the escape of a prisoner, where the defendant pleaded that *if* the said prisoner did, at any time or times after the said commitment, etc., go at large, he so escaped without the knowledge of the defendant, and against his will; and that *if* any such escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, etc.; the court held the plea bad: for "he cannot plead hypothetically that if there has been an escape, there has also been a return. He must either stand upon an averment that there has been no escape, or that there have been one, two, or ten escapes, after which the prisoner returned."[2]

RULE V.

PLEADINGS MUST NOT BE BY WAY OF RECITAL, BUT MUST BE POSITIVE IN THEIR FORM.[3] [431]

Thus if a declaration in trespass, for assault and battery, make the charge in the following form of expression: "and thereupon the said *A B*, by ———, his attorney, complains, for that **whereas** the said *C D* heretofore, to wit, etc., made an assault," etc., instead of "**for that** the said *C D* heretofore, to wit, etc., made an assault," etc., this is bad; for nothing is positively affirmed.[4]

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9. Martin v. Smith, 6 East. 557.

1. Griffiths v. Eyles, 1 Bos. & Pul. 413; Cook v. Cox, 2 M. & S. 114; The King v. Brereton, 8 Mod. 330; Witherley v. Sarsfield, 1 Show. 127.

2. Griffiths v. Eyles, 1 Bos. & Pul. 413.

3. Bac. Ab., Pleas, etc., B. 4; Sherland v. Heaton, 2 Bulst. 214; Wettenhall v. Sherwin, 2 Lev. 206; Mors v. Thacker, id., 193; Hore v. Chapman,

4. Bac. Ab., Pleas, B. 4; Sherland v. Heaton, 2 Bulst. 214; Wilder v. Handy, Str., 1151, 1162.

RULE VI.

THINGS ARE TO BE PLEADED ACCORDING TO THEIR LEGAL EFFECT OR OPERATION.[5] [432]

The meaning is, that in stating an instrument or other matter in pleading, it should be set forth not according to its *terms*, or its *form*, but according to its *effect in law*.

There is an **exception** in the case of a declaration for written or verbal **slander**, where (as the action turns on the words themselves) **the words themselves must be set forth**; and it is not sufficient to allege that the defendant published a libel containing false and scandalous matters, in substance as follows, etc., or used words to *the effect* following, etc.[6] [434]

RULE VII.

PLEADINGS SHOULD OBSERVE THE KNOWN AND ANCIENT FORMS OF EXPRESSION, AS CONTAINED IN APPROVED PRECEDENTS.[7]

It may be remarked with respect to this rule, that the allegations to which it relates are of course only those of frequent and ordinary recurrence; and that even as to these it is rather of uncertain application, as it must be often doubtful whether a given form of expression has been so fixed by the course of precedent as to admit of no variation. [436]

Another rule, connected in some measure with the last, and apparently referable to the same object, is the following: —

RULE VIII.

PLEADINGS SHOULD HAVE THEIR PROPER FORMAL COMMENCEMENTS AND CONCLUSIONS.[8]

This rule refers to certain formulae occurring at the

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5. Bac. Ab., Pleas, etc., I. 7; Com. Dig., Pleader, C. 37; 2 Saund. 97, and 97 b, n. 2; Barker v. Lade, 4 Mod. 150; Howel v. Richards, 11 East. 633; Moore v. Earl of Plymouth, 3 Barn. & Ald. 66; Stroud v. Lady Gerard, 1 Salk. 8; 1 Saund. 235 b, n. 9.

6. Wright v. Clements, 3 Barn. & Ald. 503; Cook v. Cox, 3 M. & S. 110.

7. Slade v. Dowland, 2 Bos. & Pul. 570; Dowland v. Slade, 5 East. 272; Dyster v. Battye, 3 Barn. & Ald. 448; Bayard v. Malcolm, 1 John. 471, per Kent, J., s. c., 2 id. 550. See Wills' Gould's Plead., 193, 194.

8. Co. Litt., 303 b; Com. Dig., Pleader, E. 27, E. 28, E. 32, E. 33,

commencement of pleadings subsequent to the declaration, and to others occurring at the *conclusion*.

A formula of the latter kind, inasmuch as it prays the judgment of the court for the party pleading, is often denominated **the prayer of judgment**, and **occurs in all pleadings that do not tender issue, but in those only.**

A plea to the jurisdiction has usually no *commencement* of the kind in question.[9] **Its conclusion** is as follows: —

the said *C D* prays judgment if the court of our lord the king here will or ought to have further cognizance of the plea aforesaid. [437]

or (in some cases) thus:—

the said *C D* prays judgment if he ought to be compelled to answer to the said plea here in court

A plea in abatement is also usually pleaded without a formal *commencement*, within the meaning of this rule. **The conclusion** is thus: —

in case of plea to the *writ* or *bill*,—

prays judgment of the said writ and declaration (*or* bill), and that the same may be quashed.

in case of plea to the *person*,—

prays judgment if the said *A B* ought to be answered to his said declaration (*or* bill). [438]

A plea in bar has this commencement, called actio non: —

says that the said *A B* ought not to have or maintain his aforesaid action against him, the said *C D*, because he says, etc.

The conclusion is,—

prays judgment if the said *A B* ought to have or maintain his aforesaid action against him.

A replication to a plea to the jurisdiction has this commencement: —

F. 4, F. 5, G. 1; Com. Dig., Abatement, I. 12; 2 Saund. 209, n. 1; per Holt, C. J., Bowyer v. Cook, 5 Mod. 145. See, generally, 2d and 3d vols. of Chitty's Pleading. These precedents should be carefully studied.

9. 1 Chitty's Plead. (1st Ed.), 450.

says that notwithstanding anything by the said *C D* above alleged, the court of our lord the king here ought not to be precluded from having further cognizance of the plea aforesaid, because, he says, etc.

or this: —

says that the said *C D* ought to answer to the said plea here in court, because, he says, etc.

and this **conclusion:**—

wherefore he prays judgment, and that the court here may take cognizance of the plea aforesaid, and that the said *C D* may answer over, etc. [439]

A replication to a plea in abatement has this commencement: —

where the plea was to the *writ* or *bill*,—

says that his said writ and declaration (*or* bill), by reason of anything in the said plea alleged, ought not to be quashed; because, he says, etc.

where the plea was to the *person*,—

says that notwithstanding anything in the said plea alleged, he, the said *A B*, ought to be answered to his said declaration (*or* bill), because he says, etc.

The conclusion, in most cases, is thus: —

where the plea was to the *writ* or *bill*,—

wherefore he prays judgment, and that the said writ and declaration (*or* bill), may be adjudged good, and that the said *C D* may answer over, etc. [440]

where the plea was to the *person*,—

wherefore he prays judgment, and that the said *C D* may answer over, etc.

A replication to a plea in bar has this commencement, called precludi non: —

says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against him, the said *C D*, because, he says, etc.

The conclusion is thus: —

in *debt*,—

wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him.

in *covenant*,—

wherefore he prays judgment, and his damages by him sustained by reason of the said breach of covenant, to be adjudged to him.

in *trespass*,—

wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said trespasses, to be adjudged to him.

[441]

in *trespass on the case, in assumpsit*,—

wherefore he prays judgment, and his damages by him sustained by reason of the not performing of the said several promises and undertakings, to be adjudged to him.

in *trespass on the case in general*,—

wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said several grievances, to be adjudged to him.

And so, **in all other actions**, the replication concludes with a prayer of judgment for damages or other appropriate redress, according to the nature of the action.[1]

With respect to pleadings subsequent to the replication, in general, those on the part of the defendant follow the same form of commencement and conclusion as the plea; those on the part of the plaintiff, the same as the replication.

These forms are subject to the following **variations**:—

First, with respect to *pleas in abatement*. **Matters of abatement, in general, only render the writ abatable upon plea**; but there are others, such as the death of the plaintiff or defendant before verdict or judgment by default, that are said to abate it *de facto*, the only use of the plea, in such cases, being to give the court notice of the fact. [442] **Where the writ is merely abatable, the forms of conclusion above given are to be observed; but when abated de facto, the conclusion must pray "whether the court will further**

1. See 2 Chitty's Plead. (1st Ed.), 615, 628, 630. 641.

proceed;" for the writ being already, and *ipso facto*, abated, it would be improper to pray "that it may be quashed."

Again, when a plea in bar is pleaded **puis darreign continuance**, it has, instead of the ordinary *actio non*, a *commencement* and *conclusion* of **actio non ulterius.**

So if a plea in bar be founded on any matter arising after the commencement of the action, though it be not pleaded *after a previous plea*, and therefore not puis darreign continuance, yet it pursues, in that case also, in its *commencement* and *conclusion*, the same form of **actio non ulterius**, instead of *actio non*, generally.

Again, **all pleadings by way of estoppel have a commencement and conclusion peculiar to themselves.** [443] A *plea* in estoppel has the following *commencement:*—

says that the said *A B* ought not to be admitted to say (stating the allegation to which the estoppel relates).

And the following *conclusion:*—

wherefore he prays judgment if the said *A B* ought to be admitted against his own acknowledgment, by his deed aforesaid (or otherwise, according to the matter of the estoppel), to say that (stating the allegation to which the estoppel relates).

A *replication*, by way of estoppel, to a plea, either in abatement or bar, has this *commencement:*—

says that the said *C D* ought not to be admitted to plead the said plea by him above pleaded; because he says, etc.

Its *conclusion*, in case of a plea in *abatement*, is as follows:—

wherefore he prays judgment if the said *C D* ought to be admitted to his said plea, contrary to his own acknowledgment, etc., and that he may answer over, etc.

In case of a plea in *bar:*—

wherefore he prays judgment if the said *C D* ought to be admitted, contrary to his own acknowledgment, etc., to plead that (stating the allegation to which the estoppel relates).

Rejoinders and subsequent pleadings follow the forms of pleas and replications, respectively. [444]

Again, **if any pleading be intended to apply to part only of the matter adversely alleged, it must be qualified accordingly**, in its *commencement* and *conclusion*.

Another variation occurs in the **action of replevin**. Avowries and cognizances, instead of being pleaded with *actio non*, commence thus: an **avowry**, that the defendant "*well avows;*" a **cognizance**, that he "*well acknowledges*" the taking, etc.; and concludes thus: that the defendant "prays judgment and a return of the said goods and chattels, together with his damages, etc., according to the form of the statute in such case made and provided, to be adjudged to him," etc. And the subsequent pleadings have correspondent variations.

Lastly, when, in an action of **debt on bond**, some matter is pleaded in bar, tending to show that the plaintiff *never had any right of action*, and not matter *in discharge of a right once existing* (as, for example, when it is pleaded that the bond was void for some illegality), the plea in that case, instead of *actio non*, has the following **commencement**, commonly called *omerari non:* —

says that he ought not to be charged with the said debt, by virtue of the said supposed writing obligatory, because, he says, etc.

And the **conclusion** is thus: —

wherefore he prays judgment if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory. [445]

While pleadings have thus, in general, the formal *commencements* and *conclusions*, there is **an exception in the case of all such pleadings as tender issue. These**, instead of the conclusion with a *prayer of judgment*, as in the above forms, **conclude (in the case of the trial by jury) to the country**; or (if a different mode of trial be proposed) with other appropriate formulae, as explained under the second rule of the first section. **Pleadings which tender issue have, however, the formal commencements, with the exception of the general issues**, which have neither formal commencement nor conclusion, in the sense to which the present rule refers.

In general, a defect or impropriety in the commencement and conclusion of a pleading is ground for demurrer. But

if the commencement pray the proper judgment, it seems to be sufficient, though judgment be prayed in an improper form in the conclusion. [446] And the converse case, as to a right prayer in the conclusion, with an improper commencement, has been decided the same way.[2] So if judgment be simply prayed, without specifying what judgment, it is said to be sufficient; and it is laid down that the court will, in that case, *ex officio*, award the proper legal consequence. It seems, however, that these relaxations from the rule do not apply to pleas in abatement; the court requiring greater strictness in these pleas, with a view to discourage their use.[3]

The class and character of a plea depends upon these its formula parts, which is ordinarily expressed by the maxim, *conclusio facit placitum*.[4] Accordingly, if it commence and conclude as in bar, but contain matter sufficient only to abate the writ, it is a bad plea in bar, and no plea in abatement.[5] [447] And, on the other hand, it has been held that if a plea commence and conclude, as in abatement, and show matter in bar, it is a plea in abatement, and not in bar.

As the *commencement* and *conclusion* have this effect of defining the character of the *plea*, so they have the same tendency in the replication and subsequent pleadings. For example, they serve to show whether the pleading be intended as in confession and avoidance or estoppel, and whether intended to be pleaded to the whole or to part.[6]

RULE IX.

A PLEADING WHICH IS BAD IN PART IS BAD ALTOGETHER.[7] [448]

The meaning of this rule is that, if any material part of a

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2. Talbot v. Hopewood, Fort., 335.

3. The King v. Shakespeare, 10 East. 83; Atwood v. Davis, 1 Barn. & Ald. 172.

4. The conclusion makes the plea. Street v. Hopkinson, Rep. temp. Hardw., 346; Medina v. Stoughton, 1 Ld. Raym. 593.

5. Medina v. Stoughton, *supra;* Godson v. Good, 6 Taunt. 587.

6. For common law precedents, generally, see 2d and 3d vols. Chitty on Pleading; Puterburgh's (Ill.) Com. Law Plead. & Practice; Green's (Mich.) New Practice; Burrill's (N. Y., before the Code) Practice, and Wentworth on Pleading, 10 vols. In this last work I have found precedents I was unable to find elsewhere.

7. Com. Dig., Pleader, E. 36, F. 25;

pleading, or in reference to any of the material things which it undertakes to answer, or to either of the parties answering, the pleading be bad, though in other respects it be free from objection, the whole of it is open to demurrer; so, that, if the objection be good, the whole pleading in question is overruled, and judgment given accordingly.

As the **declaration** contains no commencement or conclusion of the kind to which the last rule relates, so, on the other hand, **the declaration does not fall within the rule now in question.** [450] Therefore, if a declaration be good in part, though bad as to another part relating to a distinct demand divisible from the rest, and the defendant demur to the whole, instead of confining his demurrer to the faulty part only, the court will give judgment for the plaintiff.[8] It is also to be observed that **the rule applies only to material allegations**; for where the objectionable matter is mere surplusage, its introduction does not vitiate the rest of the pleading.[9]

SECTION VI.

ON RULES WHICH TEND TO PREVENT PROLIXITY AND DELAY IN PLEADING. [451]

RULE I.

THERE MUST BE NO DEPARTURE IN PLEADING.[1]

A departure takes place when, in any pleading, the party

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1 Saund. 28, n. 2; Webb v. Martin, 1 Lev. 48; Rowe v. Tutte, Willes, 14; Trueman v. Hurst, 1 T. R. 40; Webber v. Tivill, 2 Saund. 127; Duffield v. Scott, 3 T. R. 374; Hedges v. Chapman, 2 Bing. 523; Earl of St. Germains v. Willan, 2 Barn. & Cres. 216.

8. 1 Saund. 286, n. 9; Bac. Ab., Pleas, etc., B. 6; Cutforthay v. Taylor, Raym., 395; Judin v. Samuel, 1 New Rep. 43; Benbridge v. Day, 1 Salk. 218; Powdick v. Lyon, 11 East. 565; Amory v. Brodrick, 5 Barn. & Ald. 712.

9. Duffield v. Scott, 3 T. R. 377.

1. Co. Litt., 304; Richards v. Hodges, 2 Saund. 84; Dudlow v. Watchorn, 16 East. 39; Tolputt v. Wells, 1 M. & S. 395; Fisher v. Pimbley, 11 East. 188; Winstone v. Linn, 1 Barn. & Cres. 460. And see the numerous authorities collected in Com. Dig., Pleader, F. 7, F. 11; Bac. Ab., Pleas, etc., L.; Vin. Ab., tit. Departure; 1 Arch. 247, 253.

[either in point of fact or in point of law] deserts the ground that he took in his last antecedent pleading, and resorts to another.

A departure obviously can never take place till the *replication*, and it does not occur so frequently in the replication as in the *rejoinder*.[2] [452]

In all cases where the variance between the former and the latter pleading is *on a point not material*, there is no departure.[3] [457]

RULE II.

WHERE A PLEA AMOUNTS TO THE GENERAL ISSUE IT SHOULD BE SO PLEADED.[4] [459]

The meaning of the present rule is, that if instead of traversing the declaration in the appropriate form of the

2. Of departure in the *replication* the following is an example. In assumpsit the plaintiffs, as executors, declared on several promises alleged to have been *made to the testator* in his lifetime. The defendant pleaded that she did not promise within six years before the obtaining of the original writ of the plaintiffs. The plaintiffs replied that, within six years before the obtaining of the original writ, the letters testamentary were granted to them, whereby the action accrued *to them, the said plaintiffs*, within six years. The court held this to be a departure; as in the declaration they had laid promises to the *testator*, but in the replication alleged the right of action to accrue to *themselves as executors*. Hickman v. Walker, Willes, 27.

3. Wills' Gould's Plead., 347. See, generally, as to departure, Wills' Gould's Plead., ch. 4.

4. Co. Ltt., 303 b; Doct. & Stud., 271, 272; Com. Dig., Pleader, E. 14; Bac. Ab., Pleas, etc., pp. 370-376, 5th Ed.; 10 Hen. VI, 16; 22 Hen. VI, 37; Holler v. Bush, Salk., 394; Birch v. Wilson, 2 Mod. 277; Lynnet v. Wood, Cro. Car., 157; Warner v. Wainsford, Hob., 127; Anon., 12 Mod. 537; Saunders's Case, ibid, 513; Hallet v. Byrt, 5 Mod. 252.

"A special plea, alleging facts which would, in *evidence, maintain* the general issue, does not, in all cases, and necessarily, *amount* to the general issue. For no plea—whether it admits or denies that there was once *a right of action*—can properly be said to amount to the general issue, unless it goes in *denial of the declaration*.

Thus in assumpsit—*payment—release, accord*, etc., all which admit that the alleged cause of action once existed—as also, *infancy, coverture, duress, usury*, etc., which deny that it ever existed, may respectively be pleaded specially; although each of these defences would, in *evidence*, maintain the general issue. For they all *admit* the truth of the declaration." Wills' Gould's Plead., 521, 522.

general issue, the party pleads in a more special way matter which is constructively and in effect the same as the general issue, such plea will be bad, and the general issue ought to be substituted.

RULE III.

SURPLUSAGE IS TO BE AVOIDED.[5] [465]

Surplusage is here taken in its large sense, as including **unnecessary matter** of whatever description. To combine with the requisite certainty and precision the greatest possible *brevity* is now justly considered as the perfection of pleading.

1. **The rule prescribes the omission of matter wholly foreign.**

2. **The rule also prescribes the omission of matter which, though not wholly foreign, does not require to be stated.** [466] Any matters will fall within this description which, under the various rules enumerated in a former section as tending to limit or qualify the degree of certainty, it is unnecessary to allege; for example, **matter of mere evidence, matter of law, or other things which the court officially notices, matter coming more properly from the other side, matter necessarily implied,** etc.

3. **The rule prescribes, generally, the cultivation of brevity, or avoidance of unnecessary prolixity, in the manner of statement.**

Surplusage, however, is not a subject for demurrer; the maxim being that *utile, per inutile, non vitiatur.*[6] But when any flagrant fault of this kind occurs and is brought to the notice of the court, it is visited with the censure of the judges. They have in such cases, on motion, **referred the pleadings to the master, that he might strike out such matter as is redundant** and capable of being omitted without injury to the material averments, and in a clear case will themselves direct such matter to be struck out; and the

5. Bristow v. Wright, Doug., 667; Yates v. Carlisle, 1 Black. Rep. 270.

6. The useful is not vitiated by the useless.

party offending will sometimes have to pay the costs of the application.[7]

This is not the only danger arising from surplusage. [467]

Though traverse cannot be taken on an immaterial allegation, yet it often happens that **when material matter is alleged, with an unnecessary detail of circumstances,** the essential and non-essential parts of the statement are, in their nature, so connected as to be incapable of separation; and the opposite party is therefore entitled to include, under his traverse, the whole matter alleged. The consequence evidently is, that **the party who has pleaded with such unnecessary particularity has to sustain an increased burden of proof,** and incurs greater danger of failure at the trial.

SECTION VII.

OF CERTAIN MISCELLANEOUS RULES. [468]

These rules relate either to the *declaration,* the *plea,* or *pleadings in general,* and shall be considered in the order thus indicated.

RULE I.

THE DECLARATION SHOULD COMMENCE WITH A RECITAL OF THE ORIGINAL WRIT.[8]

The commencement of the declaration, in *personal* actions, generally consists of a *short recital of the original writ.*

Accordingly, where the writ directs the sheriff to *summon* the defendant, as in debt and covenant, the declaration begins, "*C D* was *summoned* to answer *A B* of a plea," etc. On the other hand, where by the writ the defendant is required to be *put by gages and safe pledges,* as in trespass and trespass on the case, the commencement is, "*C D* was *attached* to answer *A B* of a plea," etc. The declaration then proceeds further to recite the writ, by showing the nature of the particular requisition

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7. Price v. Fletcher, Cowp., 727; Bristow v. Wright, Doug., 667; 1 Tidd, 667, 8th ed.; Nichol v. Wilton, 1 Chitty Rep. 449, 450; Carmack v. Gundry, 3 Barn. & Ald. 272; Brindley v. Dennett, 2 Bing. 184.

8. Com. Dig., Pleader, C. 12.

or exigency of that instrument; as, for example (in debt), "of a plea that he render to the said *A B* the sum of ——— pounds," etc. [469] In debt, covenant, detinue, and trespass, nearly the whole original writ is recited; but not in trespass on the case. The course was formerly the same in the latter action also; but as this led to an inconvenient prolixity, it was by rule of court provided, that in that and some other actions it shall be sufficient to mention generally the nature of the action; thus: "a plea of trespass upon the case," etc.; and such summary form has accordingly been since used.

RULE II.

THE DECLARATION MUST BE CONFORMABLE TO THE ORIGINAL WRIT.[9] [471]

This rule is to be taken subject to this **qualification**: that the declaration in general may, and does, so far vary from the writ, that it states the cause of action more *specially*. [472]

This rule has lost much of its practical importance, as it can rarely now be enforced. For if the declaration varied from the original, the only modes of objecting to the variance (unless the fault happened to appear by the recital in the commencement of the declaration) were by plea in abatement or by writ of error. But by a change of practice, explained in the first chapter, a plea in abatement, in respect of such variance, can now no longer be pleaded, and by the statutes of jeofails and amendments, the objection cannot now be taken by way of writ of error after verdict; nor, if the variance be in a matter of form only, can it be taken after judgment by confession, *nil dicit*, or *non sum informatus*. [473] However, the effect of the rule is still felt in pleading; for its long and ancient observance had fixed the frame and language of the declaration in conformity with the original writ in each form of action; and by a rule which has already been considered, to depart from the known and established tenor of pleadings is a fault; consequently, a declaration must still be framed in conformity with the language of the original writ appropriate to the form of action, as much as when a variance from the writ actually sued out might have become the subject of a plea in abatement.

RULE III.

THE DECLARATION SHOULD, IN CONCLUSION, LAY DAMAGES, AND ALLEGE PRODUCTION OF SUIT.[1] [474]

First, the declaration must lay **damages.**

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9. Com. Dig., Pleader, C. 13; Bac. Ab., Pleas, etc., B. 4; Co. Litt., 303 a; Bract., 431 a, 435 b.

1. What are called special damages must be alleged specially. Quincy Coal Co. v. Hood, 77 Ill. 75; Campbell v. Cook, 86 Tex. 630.

In personal and mixed actions the declaration must **allege, in conclusion, that the injury is to the damage of the plaintiff, and must specify the amount of that damage.** In *personal* actions there is the distinction formerly explained between actions that *sound in damages* and those that do not; but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that in the former case damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt or the chattel demanded being the main object, damages are claimed in respect of the *detention* only of such debt or chattel, and are, therefore, usually laid at a small sum.

The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration.[2]

In real actions, no damages are to be laid; because, in these, the demand is specifically of the land withheld, and damages are in no degree the object of suit. [475]

Secondly, the declaration should also conclude with the **production of suit.**

This applies to actions of all classes, — real, personal, and mixed.

In ancient times, the plaintiff was required to establish the truth of his declaration, in the first instance, and before it was called into question upon the pleading, by the simultaneous production of his *secta*, that is, a number of persons prepared to confirm his allegations. The practice of thus producing a secta gave rise to the very ancient formula, almost invariably used at the conclusion of a declaration as entered on record: *et inde producit sectam;* and though the actual production has for many centuries fallen into disuse, the formula still remains.[3] Accordingly, except the count on a writ of right and in dower, all declarations constantly conclude thus: "And therefore he brings his suit," etc. [476]

RULE IV.

PLEAS MUST BE PLEADED IN DUE ORDER.[4] [477]

The order of pleading, as established at the present day, is as follows: —

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2. Com. Dig., Pleader, C. 84; Vin. Ab., Damages, R.; Robert Pilford's Case, 10 Rep. 117 a, b.

3. Formula still in use.

4. Wills' Gould's Plead., 94-96; Longueville v. Thistleworth, Ld. Ray., 970.

Pleas.

1. **To the jurisdiction of the court.**
2. **To the disability of the person:**
   1. Of plaintiff.
   2. Of defendant.
3. **To the count or declaration.**
4. **To the writ:**
   1. To the form of the writ:
      1. For matter apparent on the face of it.
      2. For matter dehors the writ.
   2. To the action of the writ.
5. **To the action itself in bar thereof.**

In this order the defendant may plead all these kinds of pleas successively. [478] Thus he may first plead to the jurisdiction, and, upon demurrer and judgment of *respondeat ouster* thereon, may resort to a plea to the disability of the person; and so to the end of the series.

But he cannot plead more than one plea of the same kind or degree. Thus he cannot offer two successive pleas to the jurisdiction, or two to the disability of the person.

So he cannot vary the order; for by a plea of any of these kinds he is taken to waive or renounce all pleas of a kind prior in the series.

And if issue in fact be taken upon any plea, though of the dilatory class only, the judgment on such issue (as elsewhere explained) either terminates or (in case of a plea of suspension) suspends the action; so that he is not at liberty, in that case, to resort to any other kind of plea.

RULE V.

PLEAS MUST BE PLEADED WITH DEFENCE.[5]

Defence here signifies a certain form of words by which the plea is introduced.

This form varies in some degree according to the nature of the action. [479]

In trespass the defence is: —

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5. These formulæ being at present merely matters of form, the details are omitted and the student is referred to the text.

And the said *C D*, by *E F*, his attorney, comes and defends the force and injury, when, etc., and says.

In other personal actions:—

And the said *C D*, by *E F*, his attorney, comes and defends the wrong and injury, when, etc., and says.

The word "comes" expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is accordingly not considered as in strictness constituting a part of the plea.

The etc.'s supply the place of words which were formerly inserted *at length*. [481] In a personal action, for example, the form, if fully given, would be as follows: "And the said *C D*, by *E F*, his attorney, comes and defends the force" (or "wrong") and "injury, when and where it shall behoove him, and the damages, and whatsoever else he ought to defend, and says."

RULE VI.

PLEAS IN ABATEMENT MUST GIVE THE PLAINTIFF A BETTER WRIT OR BILL.[6] [483]

The meaning of this rule is, that in pleading a mistake of form in abatement of the writ or bill, the plea must, at the same time, *correct* the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ or bill. Thus if a **misnomer** in the Christian name of the defendant be pleaded in abatement, the defendant must, in such plea, show what his true Christian name is, and even what is his true surname, and this though the true surname be already stated in the declaration, lest the plaintiff should a second time be defeated by error in the name.[7]

RULE VII.

DILATORY PLEAS MUST BE PLEADED AT A PRELIMINARY STAGE OF THE SUIT.[8] [484]

For dilatory pleas are in general not allowable after *full*

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6. Wills' Gould's Plead., 436 *et seq.*

7. "Misnomer, or want of addition, in describing *one* of *two* defendants, is not pleadable by the other. For the former may, if he pleases, admit himself to be rightly named and described." Wills' Gould's Plead., 439.

8. See, generally, Wills' Gould's Plead., 404-410 and cases cited.

defence, nor after a *general imparlance,* nor after *oyer* or a *view,* nor after *voucher,* nor after a *plea in bar.*

RULE VIII.

ALL AFFIRMATIVE PLEADINGS WHICH DO NOT CONCLUDE TO THE CONTRARY MUST CONCLUDE WITH A VERIFICATION.[9] [185]

Where an issue is tendered to be tried by jury, it has been shown that the pleading concludes *to the country.* In all other cases pleadings, if in the affirmative form, must conclude with a formula of another kind, called a *verification* or an *averment.* **The verification is of two kinds,** *common* and *special.* **The common verification** is that which applies to ordinary cases, as in the following form: "And this the said *A B*" (or "*C D*") "is ready to verify." **The special verifications** are used only where the matter pleaded is intended to be tried by record, or by some other method than a jury. They are in the following forms: "And this the said *A B*" (or "*C D*") "is ready to verify by the said record," or, "And this the said *A B*" (or "*C D*") "is ready to verify, when, where, and in such manner as the court here shall order, direct, or appoint."

RULE IX.

IN ALL PLEADINGS WHERE A DEED IS ALLEGED, UNDER WHICH THE PARTY CLAIMS OR JUSTIFIES, PROFERT OF SUCH DEED MUST BE MADE.[1] [487]

Where any party pleads a deed, and claims or justifies under it, the mention of the instrument is accompanied with

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9. See forms already given throughout this work; Wills' Gould's Plead., 323-325.

Exception.—There is one instance, however, in which new matter need not conclude with a verification, and in which the pleader may pray judgment, without it, viz.: Where the matter pleaded is merely *negative.* Willes, 5; Lawes' Pl., 145. For a negative in general requires no *proof;* and it would therefore be impertinent or nugatory for him, who pleads negative matter to declare his readiness to prove it. To an action on a *negative* covenant, therefore the defendant may plead merely that he has not done what he covenanted against, and pray judgment without a verification." Wills' Gould's Plead., 324, 325.

1. This subject is considered *ante.*

a formula to this effect: "One part of which said indenture" (or other deed), "sealed with the seal of the said ———, the said ——— now brings here into court, the date whereof is the day and year aforesaid." [488] This formula is called *making profert* of the deed. Its present practical import is, that the party has the instrument ready for the purpose of giving oyer.

The rule, in general, applies to deeds only. No profert, therefore, is necessary of any written agreement or other instrument not under seal, nor of any instrument which, though under seal, does not fall within the technical definition of a *deed;* as, for example, a sealed will or award. This, however, is subject to **exception** in the case of **letters testamentary and letters of administration**; executors and administrators being bound, when plaintiffs, to support their declaration by making profert of these instruments.[2]

The rule applies only to cases where there is occasion to mention the deed in pleading. [489] When the course of allegation is not such as to lead to any mention of the deed, a profert is not necessary, even though in fact it may be the foundation of the case or title pleaded.

The rule extends only to cases where the party claims under the deed, or justifies under it; and therefore, when the deed is mentioned only as inducement or introduction to some other matter, on which the claim or justification is founded, or alleged not to show right or title in the party pleading, but for some collateral purpose, no profert is necessary.[3]

The rule is confined, too, to cases where the party relies on the direct and intrinsic operation of the deed.[4] Thus in pleading a conveyance under the statute of uses, it is not necessary to make profert of the lease and release, because

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2. But semb. that they are not bound to make profert where they have occasion to plead the letters testamentary, etc., as *defendants*. See Marsh v. Newman, Popham, 163-4, cites 36 Hen. VI, 36.

3. Bellamy's Case, 6 Rep. 38 a; Holland v. Shelley, Hob., 303; Banfill v. Leigh, 8 T. R. 571; Com. Dig., Pleader, O. 8, O. 16; 1 Saund. 9 a, n. 1.

4. Banfill v. Leigh, 8 T. R. 573; Read v. Brookman, 3 T. R. 156.

it is the *statute* that gives effect to the conveyance, and the deeds do not intrinsically establish the title.

Another exception to the rule obtains where the deed is lost or destroyed through time or accident, or is in the possession of the opposite party.[5] These circumstances dispense with the necessity of a profert, and the formula is then as follows: "Which said writing obligatory" (or other deed) "having been lost by lapse of time" (or "destroyed by accidental fire," or "being in the possession of the said ——— "), "the said ——— cannot produce the same to the court here." [490]

RULE X.

ALL PLEADINGS MUST BE PROPERLY ENTITLED OF THE COURT AND TERM.[6] [491]

With respect to **the title of the court**, it consists, in general, of a superscription of the name of the court, thus: "In the King's Bench," "In the Common Pleas," or "In the Exchequer."[7]

With respect to **the title of the term**, it is either *general*, thus: "Trinity term, in the fourth year of the reign of King George the Fourth," or *special*, thus: "Monday next, after fifteen days of the Holy Trinity, in the fourth year of the reign of King George the Fourth." The most frequent practice is to entitle *generally* (according to the first form above given).

Such title refers to the time when the party is supposed to deliver his oral allegation in open court; and as it was only in *term* time that the court anciently sat to hear the pleading, **it is therefore always of a term that the pleadings are entitled**, though they are often in fact filed or delivered in vacation time. [492] **The term of which any pleading is entitled is usually that in which it is actually filed or delivered**, or, where this takes place in vacation time, the title is of the term last preceding.

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5. Read v. Brookman, 3 T. R. 156.

6. 1 Chitty, 261, 527, 528, 1st ed.; 1 Arch. 72, 162; Topping v. Fuge, 1 Marsh. 341.

7. 1 Chitty, 262, 527, 1st ed.; Com. Dig., Pleader, C. 7. See the examples, *supra*. Consult local works on Common Law Pleading and Practice.

RULE XI.

ALL PLEADINGS OUGHT TO BE TRUE.[8] [493]

While this rule is recognized, it is at the same time to be observed, that **in general there is no means of enforcing it as a rule of pleading,** because in general there is no way of proving the falsehood of an allegation till issue has been taken and trial had upon it.

There is an **excetion** to the rule in question, in the case of certain **fictions** established in pleading for the convenience of justice. [494] Thus the declaration **in ejectment** always states a fictitious demise made by the real claimant to a fictitious plaintiff; and the declaration **in trover** uniformly alleges, though almost alawys contrary to the fact, that the defendant *found* the goods in respect of which the action is brought.

EDITOR'S NOTE.—The edition of Stephen's Pleading used in this edition is the 2nd London edition of 1827, which in our opinion is not only the *best* but the *only* edition adapted to the use of students of the common law system of pleading. Professor Samuel Tyler, of Washington, D. C., in his preface to his edition of Stephen on Pleading of 1871, has so well stated our opinion on this subject that we quote his remarks as follows:

"In the year 1824 Mr. Stephen published the first edition of his work. In the year 1827 he published the second edition; and in the advertisement to that edition says: 'This work, as its title imports, is in its main design elementary and institutional, and intended for the use rather of those who are exploring the principles, than of those who are engaged in the practice of pleading. But as there is reason to believe that it has proved in some measure acceptable to the latter class of readers also, the author has endeavored to adapt it better to their purposes, by introducing into this second edition some additional matter of a practical kind.'"

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8. Bac. Ab., Pleas, etc., G. 4; Slade v. Drake, Hob., 295; Smith v. Yeomans, 1 Saund. 316.

Rules of practice requiring affidavits of merits to pleas are intended to meet this objection. See local works on practice.

"Dilatory pleas having been formerly used for the mere purpose of *delay*, and without any foundation in fact, it is enacted, by the statute 4 Ann, c. 16, § 11, that no plea of this class shall be received without *affidavit* made of its *truth*, or of some matter, which shall induce the court to *believe* it true. But this enactment, though universal in its terms, is applicable only to pleas alleging *extrinsic* matters: as those appearing upon the face of the record, can require no proof." Wills' Gould's Plead., 409, 410.

"In this second edition Mr. Stephen gave his matured view of the system of common-law pleading, and never attempted to do anything more towards making it more complete.

"In the year 1828, the next year after the publication of this second edition of Mr. Stephen's book, the British government appointed a commission of eminent lawyers, amongst whom was Mr. Stephen, to inquire into the practice and proceedings in the superior courts of common law. These commissioners made a report in the year 1833, recommending important changes in the system of pleading; and by acts 3 and 4 Will. IV, c. 42, power was given to the judges at Westminster to carry into effect the recommendations of the commissioners. Great changes in the forms of pleadings were accordingly effected by the pleading rules of Hilary Term, 1834, passed by the judges."

"In the next year, 1835, Mr. Stephen published a third edition of his book, conformed to the requirements of the pleading rules of Hilary Term, 1834; and other editions, conformed to the same rules, were published in 1838, 1843, and 1860. *And all the editions published in the United States since the year* 1831, *when the second edition was published in this country, are reprints of these expurgated editions, and are, and have always been, inapplicable to the practice of American courts, and unfit for the American student.* And what detracts still more from these editions is, that in the year 1850 the British government appointed another commission of law reformers, and upon their recommendations statutes were passed by Parliament in 1852, 1854, and 1860, called common-law procedure acts, by which, and the rules of court made under them, much more thorough changes were effected in pleading than those made by the pleading rules of Hilary Term, 1834, which have made all the editions of Stephen on Pleading as inapplicable to the practice of the English courts as the expurgated editions are to the practice of American courts, unless the seventh edition, by Mr. F. F. Pinder, published in 1866, which I have not seen, is conformed to these later reforms."

"From the foregoing statement, it is seen that all editions of Stephen on Pleading, except the first and second, are, so far as American courts and American lawyers are concerned, mutilated editions. Therefore it is that the second edition of the book is now reprinted, it being the best manual for law students, and a most efficient guide in the practice of American courts."

In our judgment no one can become an accomplished pleader who is not well versed in common law pleading. We commend the author to the careful consideration of students of the common law.

POLLOCK ON TORTS.

THE LAW OF TORTS.

POLLOCK ON TORTS

BOOK I.

CHAPTER I.

THE NATURE OF TORT IN GENERAL.

A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the Court to a civil remedy which is not an action of contract.[1]

Torts are to be distinguished on the one hand from contracts and on the other from criminal offences, though there are various acts which may give rise to both a civil action of tort and to a criminal prosecution, or to the one or the other at the injured party's option.

The civil wrongs for which remedies are provided by the common law of England, or by statutes creating new rights of action under the same jurisdiction, may be **classified** as follows:—

GROUP A.

Personal Wrongs.

1. Wrongs affecting safety and freedom of the person: Assault, battery, false imprisonment.
2. Wrongs, affecting personal relations in the family: Seduction, enticing away of servants.

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1. This definition has been adopted by Mr. Hale in his work on Torts, page 2. As to the difficulties inherent in the attempt to define the word "tort," see Burdick on Torts (3d Ed., 1913), pp. 2-4; Cooley on Torts (Students' Ed.), p. 1 *et seq.*

3. Wrongs affecting reputation:
   Slander and libel.
4. Wrongs affecting estate generally:
   Deceit, slander of title.
   Malicious prosecution, conspiracy.

GROUP B.

Wrongs to Property.

1. Trepass: (a) to land.
   (b) to goods.
   Conversion and unnamed wrongs, *ejusdem generis*.
   Disturbance of easements, &c.
2. Interference with rights analogous to property, such as private franchises, patents, copyrights.

GROUP C.

Wrongs to Person, Estate, and Property generally.

1. Nuisance.
2. Negligence.
3. Breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings.

The groups above shown have been formed simply with reference to the effects of the wrongful act or omission. But they appear, on further examination, to have certain distinctive characters with reference to the nature of the act or omission itself. **In Group A., generally speaking, the wrong is wilful or wanton.** Either the act is intended to do harm, or, being an act evidently likely to cause harm, it is done with reckless indifference to what may befall by reason of it.

In Group B., this element is at first sight absent, or at any rate indifferent. The intention to violate another's rights, or even the knowledge that one is violating them, is not in English law necessary to constitute the wrong of trepass as regards either land or goods, or of conversion as

regards goods. Again, it matters not whether actual harm is done. "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing." Nor is this all; for dealing with another man's goods without lawful authority, but under the honest and even reasonable belief that the dealing is lawful, may be an actionable wrong notwithstanding the innocence of the mistake. Good intentions will not afford an excuse. In one word, the duty which the law of England enforces is an absolute duty not to meddle without lawful authority with land or goods that belong to others. And the same principle applies to rights which, though not exactly property, are analogous to it. There are exceptions, but the burden of proof lies on those who claim their benefit.

In Group C., the acts or omissions complained of have a kind of intermediate character. They are not, as a rule, wilfully or wantonly harmful; but neither are they morally indifferent, save in a few extreme cases under the third head. The party has for his own purposes done acts, or brought about a state of things, or brought other people into a situation, or taken on himself the conduct of an operation, which a prudent man in his place would know to be attended with certain risks.

There are cases of this class in which liability cannot be avoided, even by proof that the utmost diligence in the way of precaution has in fact been used, and yet the party liable has done nothing which the law condemns. Such is the case of the landowner who keeps on his land an artificial reservoir of water, if the reservoir bursts and floods the lands of his neighbors. Except in these cases the liability springs from some shortcoming in the care and caution to which taking human affairs according to the common knowledge and experience of mankind, we deem ourselves entitled at the hands of our fellow-men.

Disregarding certain anomalies, the normal idea of tort may be summed up somewhat as follows:—

Definition.[2] Tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to harm suffered by a determinate person in the following ways:—

(a) It may be an act which, without lawful justification or excuse is intended by the agent to cause harm, and does cause the harm complained of.
(b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.
(c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have forseen and prevented.
(d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent.

A special duty of this kind may be (i) absolute, (ii) limited to answering for harm which is assignable to negligence.

In some positions a man becomes an insurer to the public against a certain risk, in others he warrants only that all has been done for safety that reasonable care can do.

Connected in principle with these special liabilities, but running through the whole subject, and of constant occurrence in almost every division of it, is the rule **that a master is answerable for the acts and defaults of his servants in the course of their employment.**[3]

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2. See *ante*, note.

3. See *ante*, Agency.

CHAPTER II.

PRINCIPLES OF LIABILITY.

There was a want of generality in early law. Law began not with authentic general principles, but with enumeration of particular remedies. There was no law of contracts in the modern lawyer's sense, only a list of certain kinds of agreements which might be enforced. Neither was there any law of delicts, but only a list of certain kinds of injury which had certain penalties assigned to them. Thus in the Anglo-Saxon laws we find minute assessments of the compensation due for hurts to every member of the human body, but there is no general prohibition of personal violence; and a like state of things appears in the fragments of the Twelve Tables. Whatever agreements were outside the specified forms were incapable of enforcement; whatever injuries were not in the table of compensation must go without legal redress.

In modern law, on the other hand, there exists a general duty not to do harm. The three main heads of duty with which the law of torts is concerned — namely, **to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others** — are all alike of a comprehensive nature.

The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law,[1] is generally equivalent to an act done with intent to cause wrongful injury. The old-fashioned distinction between *mala prohibita* and *mala in se* is long since exploded.

Many public duties are wholly created by special statutes.[2] In such cases it is not a universal proposition that a breach of the duty confers a private right of action on any and every person who suffers particular damage from it. The extent of the liabilities incident to a statutory duty

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1. See Miller v. Woodhead, 104 N. Y. 471; Edwards v. Railway Co., 98 N. Y. (Anno. Reprint) 245, note, p. 267; Gully v. Smith, 12 Q. B. D. 121.

2. Willey v. Malledy, 78 N. Y. 310.

must be ascertained from the scope and terms of the statute itself.

The duty to respect proprietary rights is an absolute one. See *post*.

Duties of diligence. What is due care and caution under given circumstances will be worked out in the special treatment of negligence.[3] Generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, and prudence. Moreover, **if the party has taken in hand the conduct of anything requiring special skill and knowledge, we require of him a competent measure of the skill and knowledge** usually found in persons who undertake such matters. Whoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft, and is answerable accordingly. If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril.[4]

An exception to this principle arises where in emergency, and to avoid imminent risk, the conduct of something generally entrusted to skilled persons is taken by an unskilled person.[5]

Liability in relation to consequences of act or default. When complaint is made that one person has caused harm to another, the first question is whether his act was really the cause of that harm in a sense upon which the law can take action. **Liability must be founded on an act which is the "immediate cause"** of harm or of injury to a right. Again, there may have been an undoubted wrong, but it may be doubted how much of the harm that ensues is related to the wrongful act as its "immediate cause," and therefore is to be counted in estimating the wrong-doer's liability. The distinction of proximate from remote consequences is needful, first, to ascertain whether there is any liability at all, and then, if it is established that wrong has been committed, to settle

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3. See *post*.

4. See Cooley on Torts (Students' Ed.), 668 *et seq.* and cases cited; Ewell's Med. Jur. (2d Ed.), ch. 19,

5. See the unabridged text, Webb's Ed., p. 28.

the footing on which compensation for the wrong is to be awarded.[6]

In cases of tort the primary question of liability itself often depends on the nearness or remoteness of the harm complained of. Except where we have an absolute duty and an act which manifestly violates it, no clear line can be drawn between the rule of liability and the rule of compensation. The measure of damages, which appears at first sight to belong to the law of remedies more than of "antecedent rights," constantly involves, in the field of torts, points that are in truth of the very substance of the law.[7]

The meaning of the term "immediate cause" is not capable of perfect or general definition. **For the purpose of civil liability, those consequences, and those only, are deemed "immediate," "proximate," or "natural and probable," which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct.** This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was "immediate" or not does not matter.[8]

In the case of wilful wrong-doing we have an act intended to do harm, and harm done by it. In such case liability may ertend to some consequences not intended. Thus, in the case of Scott v. Shepherd,[9] Shepherd throws a lighted squib into a building full of people. It falls near a person who, by an instant and natural act of self-protection, casts it from him. A third person again does the same. In this third flight the squib meets with Scott, strikes him in the face, and explodes, destroying the sight of one eye. Shepherd neither threw the squib at Scott, nor intended such

6. See Burdick on Torts (3d Ed.), 106 *et seq.*

7. Id.

8. Id., 106-125 and cases cited; Hadley v. Baxendale, 9 Ex. 341.

9. Scott v. Shepherd, 2 W. Bl. 892; s. c. 1 Sm. L. C. *549 and notes; Vandenburg v. Truax, 4 Denio, 464.

grave harm to any one; but he is none the less liable to Scott.

This principle is commonly expressed in the **maxim** that **"a man is presumed to intend the natural consequences of his acts."**[1]

The doctrine of "natural and probable consequence" is most clearly illustrated in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight; it has been **defined** as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[2] A reasonable man can be guided only by a reasonable estimate of probabilities. If in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability.

CHAPTER III.

PERSONS AFFECTED BY TORTS.

1. *Limitations of Personal Capacity.*

Generally speaking, in the law of tort there is no limit to personal capacity either in becoming liable for civil injuries, or in the power of obtaining redress for them. It seems on principle that where a particular intention, knowledge, or state of mind in the person charged as a wrong-doer is an element, as it sometimes is, in constituting the alleged wrong, the age and mental capacity of the person may and should be taken into account (along with other relevant circumstances) in order to ascertain as a fact whether that intention, knowledge, or state of mind was present. But in

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1. See this principle illustrated in the cases of Vandenburgh v. Truax, 4 Denio, 464; Guille v. Swan, 19 Johns. 381; Glover v. London, etc., Railway Co., L. R. 3 Q. B. 25.

2. See Cooley on Torts (Students' Ed.), 683-687.

every case it would be a question of fact, and no exception to the general rule would be established or propounded.[1]

There exists a **partial exception,** however, in the case of **alien enemies,** and **apparent exceptions** as to **infants and married women. An alien enemy** cannot sue in his own right in any English court.[2] Nor is the operation of the Statute of Limitation suspended, it seems, by the personal disability. **An infant cannot be made liable for what is in truth a breach of contract by framing the action ex delicto.** You cannot convert a contract into a tort to enable you to sue an infant.[3] And the principle goes to this extent, that no action lies against an infant for a fraud whereby he has induced a person to contract with him, such as a false statement that he is of full age.[4] But where an infant commits a wrong of which a contract, or the obtaining of something under a contract, is the occasion, but only the occasion, he is liable.

An infant cannot take advantage of his own fraud; that is, he may be compelled to specific restitution, where that is possible, of anything he has obtained by deceit, nor can he hold other persons liable for acts done on the faith of his false statement, which would have been duly done if the statement had been true.

A married woman was by the common law incapable of binding herself by contract, and therefore, like an infant, she could not be made liable as for a wrong in an action for deceit or the like, when this would have in substance amounted to making her liable on a contract. **In other cases of wrong she was not under any disability, nor had she any immunity;**[5] but she had to sue and be sued jointly with her husband.[6]

As to corporations, personal injuries cannot be inflicted upon them. It was long supposed that a corporation also

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1. Ulpian, in D. 9, 2 *ad leg.* Aquil, 5, § 2.

2. See McVeigh v. U. S., 11 Wallace, 259; Burnside v. Matthews, 44 N. Y. 78; and *ante,* Contracts.

3. Jennings v. Rundall, 8 T. R. 335; Ewell's Lead. Cases (1st Ed.), 185-206, note.

4. See next note, *supra.*

5. See Burdick on Torts (3d Ed.), 140.

6. Id.

cannot be liable for personal wrongs. But this is really part of the larger question of the liability of principals and employers for the conduct of persons employed by them. In that connection we recur to the matter further on.

Where bodies of persons, incorporated or not, are intrusted with the management and maintenance of works, or the performance of other duties of a public nature, they are in their corporate or *quasi*-corporate capacity responsible for the proper conduct of their undertakings no less than if they were private owners; and this whether they derive any profit from the undertaking or not.

2. *Effect of a Party's Death.*

Effect of death of either party. The common law maxim is actio personalis moritur cum persona,[7] or the right of action for tort is put an end to by the death of either party, even if an action has been commenced in his lifetime. Causes of action on a contract are quite as much "personal" in the technical sense, but, with the exception of promises of marriage, and (it seems) injuries to the person by negligent performance of a contract, the maxim does not apply to these. In cases of tort not falling within statutory exceptions, the estate of the person wronged has no claim, and that of the wrong-doer is not liable.

The rule has even been pushed to this extent, that **the death of a human being cannot be a cause of action in a civil Court** for a person not claiming through or representing the person killed, who in the case of an injury short of death would have been entitled to sue. A master can sue for injuries done to his servant by a wrongful act or neglect, whereby the service of the servant is lost to the master. But if the injury causes the servant's death, it is held that the master's right to compensation is gone.[8]

Exceptions. The first amendment was made as long ago

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7. Broom's Leg. Max., *811; Noy-Max., 14. See Webb's Edition, Pollock on Torts, 71 *et seq.*; Burdick on Torts (3d Ed.), 262 *et seq.*

8. Osborn v. Gillett (1873), L. R. 8 Ex. 88, diss. Bramwell, B.

as 1330, by the **statute 4 Ed. 3, c. 7,**[9] of which the English version runs thus:—

Item, whereas in times past **executors** have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have on action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life.

The right was expressly extended to **executors of executors by 25 Ed. 3, st. 5, c. 5,** and was construed to extend to administrators. It was held not to include injuries to the person or to the testator's freehold.[1]

Nothing in these statutes affects the case of a personal injury causing death, for which, according to the maxim, there is no remedy at all. Where the cause of action is in substance an injury to the person, an action by personal representatives cannot be admitted on the ground of damage to the personal estate by reason thereof, such as expenses of medical attendance, etc.; the original wrong itself, not only its consequences, must be an injury to property.

The hardship of the common-law rule in the case of railway accidents brought about the passing of Lord Campbell's Act (9 and 10 Vict. c. 93, A. D. 1846), which, instead of abolishing the barbarous rule complained of, confers a right of action on the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default such that if death had not ensued, that person might have maintained an action; but the right conferred is not for the benefit of the personal estate, but "for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused."[2]

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9. See, also, 3 & 4 Wm. 4, ch. 42; Burdick on Torts (3d Ed.), 263, for American legislation. Consult local statutes.

1. See, also, Stat. 3 & 4 Wm. 4, ch. 42 (A. D. 1833); Burdick on Torts (3d Ed.), 263.

2. Similar statutes exist in most, if not all, the states as well as in the federal jurisdiction. See Burdick on Torts (3d Ed.), 267.

Under this statute it has been decided that some appreciable pecuniary loss to the beneficiaries must be shown; they cannot maintain an action for nominal damages, nor recover what is called *solatium* in respect of the bodily hurt and suffering of the deceased or their own affliction; they mush show "a reasonable expectation of pecuniary benefit, as of right or otherwise," had the deceased remained alive. But a legal right to receive benefit from him need not be shown.

The interests conferred by the Act on the several beneficiaries are distinct. The cause of action under the statute is so far the same as that which the person killed would have had, had he lived, that if a person who ultimately dies of injuries caused by wrongful act or neglect has accepted satisfaction for them in his lifetime, an action under Lord Campbell's Act is not afterwards maintainable.

In Scotland, the surviving kindred are entitled by the common law to compensation in these cases, not only to the extent of actual damage but by way of *solatium*. **In the United States** there exist almost everywhere statutes generally similar to Lord Campbell's Act; but they differ considerably in details from that Act and from one another. The tendency seems to be to confer on the survivors, both in legislation and in judicial construction, larger rights than in England.[3]

Where property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys, inasmuch as the action brought by the true owner, in whatever form, is in substance to recover property, the action does not die with the person, but the property or the proceeds or value which, in the lifetime of the wrong-doer, could have been recovered from him, can be traced after his death to his assets (by suing the personal representatives) "and recaptured by the rightful owner there." But this rule is limited to the recovery of specific acquisitions or their

3. See Burdick on Torts (3d Ed.), 267; Cooley on Torts (Students' Ed.), ch. 8.

value. It does not include the recovery of damages, as such, for a wrong, though the wrong may have increased the wrong-doer's estate in the sense of being useful to him or saving him expense.[4]

3. *Liability for the Torts of Agents and Servants.*

Whoever commits a wrong is liable for it himself. It is no excuse that he was acting, as an agent or servant, on behalf and for the benefit of another.[5] But that other may well be also liable; and in many cases a man is held answerable for wrongs not committed by himself. The rules of general application in this kind are those concerning the liability of a principal for his agent, and of a master for his servant.[6]

Under certain conditions responsibility goes farther, and a man may have to answer for wrongs which, as regards the immediate cause of the damage, are not those of either his agents or his servants. Thus we have cases where a man is subject to a positive duty, and is held liable for failure to perform it. Special duties created by statute, as conditions attached to the grant of exceptional rights or otherwise, afford the chief examples of this kind. Here the liability attaches, irrespective of any question of agency or personal negligence, if and when the conditions imposed by the legislature are not satisfied.

There occur likewise, though as an exception, duties of this kind imposed by the common law. Such are the duties of **common carriers**, of **owners of dangerous animals**, or other things involving, by their nature or position, special risk of harm to their neighbors; and such, to a limited extent, is the duty of occupiers of fixed property to have it in reasonably safe condition and repair.

The degrees of responsibility may be thus arranged, beginning with the mildest:

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4. Hambley v. Trott, 1 Cowp. 375; Phillips v. Humpry, 24 Ch. Div. 454, 463.

5. Cullen v. Thompson, 4 Macq. 432; Mitchell v. Harmony, 14 How. 115.

6. See Agency, *ante*, where most of the rules here considered are more properly discussed.

(i) For one's self and specifically authorized agents (this holds always).
(ii) For servants or agents generally (limited to course of employment).
(iii) For both servants and independent contractors (duties as to safe repair, etc.).
(iv) For everything but *vis major* (exceptional: some cases of special risk, and, anomalously, certain public occupations).

Apart from the cases of exceptional duty, where the responsibility is in the nature of insurance or warranty, **a man may be liable for another's wrong—**

(1) **As having authorized or ratified** that particular wrong:

(2) **As standing to the other person in a relation making him answerable** for wrongs committed by that person in virtue of their relation, though not specifically authorized.

The former head presents little or no difficulty. The latter includes considerable difficulties of principle, and is often complicated with troublesome questions of fact.

It scarce needs authority to show that **a man is liable for wrongful acts which have been done according to his express command or request, or which, having been done on his account and for his benefit, he has adopted as his own.**[7]

This is not the less so because the person employed to do an unlawful act may be employed as an "**independent contractor,**" so that, supposing it lawful, the employer would not be liable for his negligence about doing it.[8]

A point of importance to be noted in this connection is that **only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf.** What is done by the immediate actor on his own account cannot be effectually adopted by another, neither can an act done in the name and on behalf of Peter be ratified either for gain or for loss by Pohn.[9]

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7. Barker v. Braham, 2 W. Bl. 866; s. c. Big. Lead. Cases on Torts, 325; Elder v. Bemis, 2 Metc. 599.

8. Hawver v. Whalen, 49 Ohio St. 69.

9. Wilson v. Tumman, 6 M. & G. 236, 239, note.

The more general rule governing the other and more difficult branch of the subject was thus expressed by Willes, J.: "**The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.**" [1]

1. **Who is a servant. A master** is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or, as it has been put, "retains the power of controlling the work;"[2] and he who does work on those terms is in law **a servant** for whose acts, neglects, and defaults, to the extent to be specified, the master is liable.

An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. For the acts or omissions of such a one about the performance of his undertaking his employer is not liable to strangers.[3]

"In ascertaining who is liable for the act of a wrong-doer, you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable." [4]

It must be remembered that the remoter employer, if at any point he does interfere and assume specific control, renders himself answerable, not as master, but as principal.[5] He makes himself *dominus pro tempore*.[6]

The "power of controlling the work" which is the legal criterion of the relation of a master to a servant **does not necessarily mean a present and physical ability.** Ship-

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1. Barwick v. Bank, Ex. Ch. L. R. 2 Ex. 265; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 624; *ante*, Agency.

2. Sadler v. Henlock, 4 E. & B. 578, per Crompton, J.

3. Per Bramwell, L. J., Emp. L. 1877, p. 58.

4. Per Willes, J., Murray v. Currie, L. R. 6 C. P. 27.

5. McLaughlin v. Pryor, 4 M. & G. 48.

6. Master for the time.

owners are answerable for the acts of the master, though done under circumstances in which it is impossible to communicate with the owners. It is enough that the servant is bound to obey the master's directions if and when communicated to him.[7]

2. **What acts are deemed to be in the course of service. The injury** in respect of which a master becomes subject to this kind of vicarious liability **may be caused in the following ways:—**

(a) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.

(b) It may be due to the servant's want of care in carrying on the work or business in which he is employed. This is the commonest case.

(c) The servant's wrong may consist in excess or mistaken execution of a lawful authority.

(d) Or it may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

(a) **Execution of specific orders.** Here the servant is the master's agent in a proper sense, and the master is liable for that which he has truly, not by the fiction of a legal maxim, commanded to be done. He is also liable for the natural consequences of his orders, even though he wished to avoid them, and desired his servant to avoid them.[8]

(b) **Negligence in conduct of master's business.** It must be established that the servant is a wrong-doer, and liable to the plaintiff, before any question of the master's liability can be entertained. Assuming this to be made out, the question may occur whether the servant was in truth on his master's business at the time, or engaged on some pursuit of his own. In the latter case the master is not liable.[9]

Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be

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7. See Mande & Pollock, Merchant Shipping (4th Ed.), i. 158.

8. Gregory v. Piper, 9 B. & C. 591.

9. Croft v. Alison, 4 B. & A. 590; Coulon v. R. R. Co., 135 Mass. 195.

troublesome. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be "on a frolic of his own," the master is no longer answerable for the servant's conduct.[1]

(c) **Excess or mistake in execution of authority.** To establish a right of action against the master in such a case it must be shown that (a) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; (b) the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful.[2]

The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind or sanctioned in particular he is not chargeable. Most of the cases on this head have arisen out of acts of railway servants on behalf of companies.

But the master is not answerable if the servant takes on himself, though in good faith and meaning to further the master's interest, that which the master has no right to do even if the facts were as the servant thinks them to be.[3] The same rule holds if the particular servant's act is plainly beyond his authority. In a case not clear on the face of it, the extent of the servant's authority is a question of fact. Much must depend on the nature of the matter in which the authority is given.

(d) **Lastly, a master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes:** and this, no less than in other cases, although the servant's

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1. Joel v. Morison, 6 C. & P. 503, per Parke, B., Quinn v. Power, 87 N. Y. 535.

2. Bailey v. Railway Co., L. R. 7 C. P. 415; Penn. Ry. Co. v. Toomey, 91 Pa. St. 256.

3. Poulton v. Railway Co., L. R. 2 Q. B. 534.

conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the "wilful and malicious" wrong of his servant. If "malicious" means "committed exclusively for the servant's private ends," or "malice" means "private spite," this is a correct statement;[4] otherwise it is contrary to modern authority. The question is not what was the nature of the act itself, but whether the servant intended to act in the master's interest.[5]

An employer is liable for frauds of his servant committed without authority, but in the course of the service and for the employer's purposes.[6]

A firm is answerable for fraudulent misappropriation of funds, and the like, committed by one of the partners in the course of the firm's business and within the scope of his usual authority, though no benefit be derived therefrom by the other partners. But the firm is not liable if the transaction undertaken by the defaulting partner is outside the course of partnership business.[7]

3. **Injuries to servants by fault of fellow-servants. The common-law rule of master's immunity,** as it stood before the Employer's Liability Act of 1880, is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service. "A servant, when he engages to serve a master, undertakes, as between himself and his master to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both."[8]

The phrase "common employment" is frequent in this class of cases. **All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellow-servants**

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4. H. & C., 543, per Blackburn, J. See Burdick on Torts (3d Ed.), 180 *et seq.*

5. Limpus v. Omnibus Co., 1 H. & C. 526.

6. Shaw v. Mining Co., 13 Q. B. 103; Calvin v. Holbrook, 2 N. Y. 126.

7. See Blair v. Bromley, 2 Ph. 354.

8. Burdick on Torts (3d Ed.), 202; Cooley on Torts (Students' Ed.), 541.

in a common employment within the meaning of this rule: for example, a carpenter doing work on the roof of an engine-shed and porters moving an engine on a turn-table. Where there is one common general object, in attaining which a servant is exposed to risk, he is not entitled to sue the master if he is injured by the negligence of another servant while engaged in furthering the same object.

It makes no difference if the servant by whose negligence another is injured is a foreman, manager, or other superior in the same employment, whose orders the other was by the terms of his service bound to obey.[9]

The master is bound, as between himself and his servants, to exercise due care in selecting proper and competent persons for the work whether as fellow-workmen in the ordinary sense, or as superintendents or foremen, and to furnish suitable means and resources to accomplish the work, and he is not answerable further.[1]

A stranger who gives his help without reward to a man's servants engaged in any work is held to put himself, as regards the master's liability towards him, in the same position as if he were a servant.[2]

On the other hand, a master who takes an active part in his own work is not only himself liable to a servant injured by his negligence, but, if he has partners in the business, makes them liable also. For he is the agent of the firm, but not a servant:[3] the partners are generally answerable for his conduct, yet cannot say he was a fellow-servant of the injured man.

The principle of the Employers' Liability Act, 1880, (43 & 44 Vict., c. 42), so far as the Act has any principle, is that of holding the employer answerable for the conduct of those who are delegated authority under him.[4]

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9. See, generally, Cooley on Torts (Students' Ed.), 546.

1. As to the special duties of the master towards his servant, including the duty to employ suitable fellow servants, see Burdick on Torts (3d Ed.), 184-198 and cases cited.

2. Potter v. Faulkner, Ex. Ch. 1 B. & S. 800.

3. Ashworth v. Stanwix, 3 E. & E. 701.

4. The common law liability of employees has been greatly modified by state and federal statutes. Consult the statutes and see, also, Burdick on Torts (3d Ed.), 218.

CHAPTER IV.

GENERAL EXCEPTIONS.

Conditions excluding liability for act prima facie wrongful. There are various conditions which, when present, will prevent an act from being wrongful which in their absence would be a wrong. Under such conditions the act is said to be **justified or excused.** And when an act is said in general terms to be wrongful, it is assumed that no such qualifying condition exists.

Some of the principles by which liability is excluded are applicable indifferently to all or most kinds of injury, while others are confined to some one species. **General exceptions** are the exceptions which now concern us. The following seems to be their chief categories. **An action is within certain limits not maintainable in respect of** the acts of political power called "**acts of State,**" nor of **judicial acts.** **Executive acts of lawful authority** form another similar class. Then a class of **acts** had to be considered which may be called **quasi-judicial,** and which, also within limits are protected. Also, there are various cases in which **unqualified or qualified immunity** is **conferred upon private persons** exercising an authority or power specially conferred by law. We may regard all these as cases of privilege in respect of the person or the occasion. After these come exceptions which are more an affair of common right: **inevitable accident** (a point not clearly free from doubt), **harm inevitably incident to the ordinary exercise of rights,** harm **suffered by consent** or under conditions amounting to acceptance of the risk, and harm inflicted in **self-defense** or (in some cases) otherwise by necessity.

1. *Acts of State.*

The term "Acts of State" appears to signify—(1) An act done or adopted by the prince or rulers of a foreign independent State in their political and sovereign capacity, and within the limits of their *de facto* political sovereignty; (2) more particularly, "an act injurious to the person or

to the property of some person who is not at the time of that act a subject of her Majesty; which act is done by any representative of her Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by her Majesty" (such sanction or ratification being, of course, expressed in the proper manner through responsible ministers).

Our courts of justice profess themselves not competent to discuss acts of these kinds for reasons thus expressed by the Judicial Committee of the Privy Council:—"The transactions of independent States between each other" (and with subjects of other States), "are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

The leading case on this subject to Buron v. Denman, 2 Ex. 167. The defendant in that case, who was a captain in the British navy, burned certain barracoons on the West Coast of Africa and released the slaves therein confined. His act, though not previously authorized, was ratified by the British government. This action was brought against the captain for the loss of the slaves; but it was held that no action could be maintained because the acts of the captain were acts of the State.[1]

As between the sovereign and his subjects, however, there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not; as, for example, when the Court of King's Bench decided that a Secretary of State had no power to issue general warrants to search for and seize papers and the like.[2]

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1. See Burdick on Torts (3d Ed.), 41 *et seq.*

2. Entick v. Carrington, 19 St. Tr. 1043.

Acts of foreign powers. There is another quite distinct point of jurisdiction in connection with which the term "act of State" is used. A sovereign prince or other person representing an independent power is not liable to be sued in the courts of this country for acts done in a sovereign capacity; and this even if in some other capacity he is a British subject, as was the case with the King of Hanover, who remained an English peer after the personal union between the Crowns of England and Hanover was dissolved.[3] This rule is included in a wider one, which not only extends beyond the subject of this work, but belongs to international as much as to municipal law. It has been thus expressed by the Court of Appeal: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise, by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

2. *Judicial Acts.*

As to judicial acts, the rule is that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice."[4] And the exemption is not confined to judges of superior courts. But in order to establish the exemption as regards proceedings **in an inferior court, the judge must show that at the time of the alleged wrong-doing some matter was before him in which he had jurisdiction (whereas in the case of a superior**

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3. Duke of Brunswick v. King of Hanover, 6 Beav. 1, 57, affirmed 2 House of Lords Cases, 1; Beers v. Arkansas, 20 How. 527; Manning v. State of Nicaraugua, 14 How. Pr. 517.

4. Burdick on Torts (3d Ed.), 35 and cases cited.

court it is for the plaintiff to prove want of jurisdiction); and the act complained of must be of a kind which he had power to do as judge in that matter.[5]

A judge is not liable in trespass for want of jurisdiction, unless he knew or ought to have known of the defect; and it lies on the plaintiff, in every such case, to prove that fact. And the conclusion formed by a judge, acting judicially and in good faith, on a matter of fact, which it is within his jurisdiction to determine, cannot be disputed in an action against him for anything judicially done by him in the same cause upon the footing of that conclusion.

Allegations that the act complained of was done "**maliciously and corruptly,**" that words were spoken "**falsely and maliciously,**" or the like, will not serve to make an action of this kind maintainable against a judge either of a superior or of an inferior court.[6]

There are two cases in which by statute **an action does** or did **lie** against a judge for misconduct in his office,—namely, if he **refuses to grant a writ of habeas corpus** in vacation time, and if he refused to **seal a bill of exceptions.**[7]

The rule of immunity for judicial acts is applied not only to judges of the ordinary civil tribunals, but **to members of naval and military courts-martial or courts of inquiry** constituted in accordance with military law and usage. It is also applied to a limited extent **to arbitrators,** and to any person who is in a position like an arbitrator's, as having been chosen by the agreement of parties to decide a matter that is or may be in difference between them. Such a person, if he acts honestly, is not liable for errors in judgment. He would be liable for a corrupt or partisan exercise of his office; but if he really does use a judicial discretion, the rightness or competence of his judgment cannot be brought

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5. On this subject, Mr. Burdick says: "On grounds of public policy both classes [of judges] are entitled to equal protection, and the most recent and best considered cases in this country, as well as in England, accord that protection." Burdick on Torts (3d Ed.), 38, citing Grove v. Van Duyn, 14 N. J. L. 654 and other cases.

6. Id.

7. Consult the local statutes.

into question for the purpose of making him personally liable.

The doctrine of our courts on this subject appears to be fully and uniformly accepted in the United States.[8]

3. *Executive Acts.*

As to executive acts of public officers, no legal wrong can be done by the regular enforcement of any sentence or process of law, nor by the necessary use of force for preserving the peace.[9] Private persons are in many cases entitled, and in some bound, to give aid and assistance, or to act by themselves, in executing the law; and in so doing they are similarly protected.

But a public officer may err by going beyond his authority in various ways. When this happens there are **distinctions to be observed.** The principle which runs through both common law and legislation in the matter is that **an officer is not protected from the ordinary consequences of unwarranted acts, which it rested with himself to avoid,** such as using needless violence to secure a prisoner; **but he is protected if he has only acted in a manner in itself reasonable, and in execution of an apparently regular warrant or order, which, on the face of it, he was bound to obey.**[1] **This applies only to irregularity in the process of a court having jurisdiction over the alleged cause.** Where an order is issued by a court which has no jurisdiction at all in the subject-matter, so that the proceedings, are, as it is said, *coram non judice,* the exemption ceases.

As to a mere mistake of fact, such as arresting the body or taking the goods of the wrong person, an officer of the law is not excused in such a case. He must lay hands on the right person or property at his peril, the only exception being on the principle of estoppel, where he is misled by the party's own act.[2]

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8. See Burdick on Torts (3d Ed.), 39-41 and notes.

9. See, generally, Burdick on Torts, 45-51 and cases cited.

1. See, generally, Cooley on Torts (Students' Ed.), 161 *et seq.*

2. Glasspoole v. Young, 9 B. & C. 696.

Acts done by naval and military officers in the execution or intended execution of their duty, for the enforcement of the rules of the service and preservation of discipline, fall to some extent under this head. There is very great weight of opinion, but no absolute decision, that an action does not lie in a civil court for bringing an alleged offender against military law (being a person subject to that law) before a court-martial without probable cause. How far the orders of a superior officer justify a subordinate who obeys them as against third persons has never been fully settled. But the better opinion appears to be that the subordinate is in the like position with an officer executing an apparently regular civil process,—namely, that he is protected if he acts under orders given by a person whom he is generally bound by the rules of the service to obey, and of a kind which that person is generally authorized to give, and if the particular order is not necessarily or manifestly unlawful.[3]

The same principles apply to the exemption of a person acting under the orders of any public body competent in the matter in hand. An action does not lie against the Sergeant-at-arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House itself; this being a matter of internal discipline in which the House is supreme.[4]

4. *Quasi-judicial Acts.*

Divers persons and bodies are called upon, in the management of public institutions or government of voluntary associations, to exercise a sort of conventional jurisdiction analogous to that of inferior courts of justice. These quasi-judicial functions are in many cases created or confirmed by Parliament. Such are the powers of the **universities** over their officers and graduates, and of **colleges** in the universities over their fellows and scholars. Often the authority of the quasi-judicial body depends on an instrument of foundation, the provisions of which are binding on all per-

3. See, generally, Burdick on Torts, 48 and cases cited.

4. Bradlaugh v. Gossett, 12 Q. B. D. 271.

sons who accept benefits under it. Such are the cases of **endowed schools** and **religious congregations.** And the same principle appears in the constitution of **modern incorporated companies,** and even of **private partnerships.** Further, a quasi-judicial authority may exist by the mere convention of a number of persons who have associated themselves for any lawful purpose, and have entrusted powers of management and discipline to select members. The committees of most **clubs** have by the rules of the club some such authority, or at any rate an initiative in presenting matters of discipline before the whole body. **The Inns of Court** exhibit a curious and unique example of great power and authority exercised by voluntary unincorporated societies in a legally anomalous manner. Their powers are for some purposes quasi-judicial, and yet they are not subject to any ordinary jurisdiction.

The general rule as to quasi-judicial powers of this class is that persons exercising them are protected from civil liability if they observe the rules of natural justice, and also the particular statutory or conventional rules, if any, which may prescribe their course of action. The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having **fair and sufficient notice of what is alleged against him, and an opportunity of making his defense**; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a court of justice will not interfere, not even if it thinks the decision was in fact wrong. If not, the act complained of will be declared void, and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with.[5] These principles apply to the expulsion of a partner from a private firm where a power of expulsion is conferred by the partnership contract.[6]

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5. See Allbutt v. Council, 23 Q. B. Div. 400; Farnsworth v. Storrs, 5 Cush. 412.

6. See *ante*, Partnership.

Absolute discretionary powers. It may be, however, that by the authority of Parliament (or, it would seem, by the previous agreement of the party to be affected) a governing or administrative body, or the majority of an association, has power to remove a man from office, or the like, without anything in the nature of judicial proceedings, and without showing any cause at all.[7] Whether a particular authority is judicial or absolute must be determined by the terms of the particular instrument creating it.

On the other hand there may be question whether the duties of a particular office be quasi-judicial, or merely ministerial or judicial for some purposes and ministerial for others. It seems that at common law the returning or presiding officer at a parliamentary or other election has a judicial discretion, and does not commit a wrong if by an honest error of judgment he refuses to receive a vote; but now in most cases it will be found that such officers are under absolute statutory duties which they must perform at their peril.[8]

5. *Parental and quasi-parental Authority.*

There are several kinds of authority in the way of summary force or restraint which the necessities of society require to be exercised by private persons. **And such persons are protected in exercise thereof, if they act with good faith and in a reasonable and moderate manner.**

Parental authority (whether in the hands of a father or guardian, or of a person to whom it is delegated, **such as a schoolmaster)** is the most obvious and universal instance.[9]

Persons having the lawful custody of a lunatic, and those acting by their direction, are justified in using such reasonable and moderate restraint, as is necessary to prevent the lunatic from doing mischief to himself or others, or required, according to competent opinion, as part of his treatment.[1]

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7. Hayman v. Rugby School, 18 Eq. 28.

8. See Webb's note, Pollock on Torts, 148 and cases cited.

9. Burdick on Torts, 153 and cases cited; Cooley on Torts (Students' Ed.), 157.

1. Cooley on Torts, 165.

In the case of a drunken man, or one deprived of self-control by a fit or other accident, the use of moderate restraint, as well for his own benefit as to prevent him from doing mischief to others, may in the same way be justified.

6. *Authorities of Necessity.*

The master if a merchant ship has by reason of necessity the right of using force to preserve order and discipline for the safety of the vessel and the persons and property on board. The master may even be justified in a case of extreme danger in inflicting punishment without any form of inquiry. But "in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and * * * the party charged should have the benefit of that rule of universal justice, of being heard in his own defense." In fact, when the immediate emergency of providing for the safety and discipline of the ship is past, the master's authority becomes a quasi-judicial one.[2]

7. *Damage incident to Authorizcd Acts.*

The general precept of law is commonly stated to be *sic utere ut alienum non loedas.*[3] If this were literally and universally applicable, a man would act at his peril whenever and wherever he acted otherwise than as the servant of the law. But the precept is understood to be subject to large exceptions. Its real use is to warn us against the abuse of the more popular adage that "**a man has a right to do as he likes with his own,**" which errs much more dangerously on the other side.

There are limits to what a man may do with his own; and if he does that which may be harmful to his neighbor, it is his business to keep within those limits. Neither the Latin nor the vernacular maxim will help us much, however, to know where the line is drawn. The problems raised by the

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2. See the leading case The Agin Court, 1 Hagg. 271, 274, per Lord Stowell.

3. See Phelps v. Nowlen, 72 N. Y. (Anno. Reprint) 46, also valuable note on page 49.

apparent opposition of the two principles must be dealt with each on its own footing.

Damage from execution of authorized works. "**No action will lie for doing that which the Legislature has authorized, if it be done without negligence,** although it does occasion damage to any one."[4] The meaning of the qualification will appear immediately. Subject thereto, "**the remedy of the party who suffers the loss is confined to recovering such compensation (if any) as the Legislature has thought fit to give him.**"[5] Instead of the ordinary question whether a wrong has been done, there can only be a question whether the special power which has been exercised is coupled, by the same authority that created it, with a special duty to make compensation for incidental damage. Apart from the question of statutory compensation, no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner.

But in order to secure this immunity the powers conferred by the Legislature must be exercised without negligence, or, as it is perhaps better expressed, with judgment and caution. For damage which could not have been avoided by any reasonably practicable care on the part of those who are authorized to exercise the power, there is no right of action. But they must not do needless harm; and if they do, it is a wrong against which the ordinary remedies are available. "When the company can construct its works without injury to private rights, it is in general bound to do so." Hence there is a material distinction between cases where the Legislature "directs that a thing shall at all events be done," and those where it only gives a discretionary power with choice of times and places. Where a discretion is given, it must be exercised with regard to the common rights of others. And even where a particular thing is required to be done, the burden of proof is on the person who

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4. Geddis v. Bann Reservoir, 3 App. Cas. 455; Hammersmith v. Brand, L. R. 4 H. L. 171.
5. Id.

has to do it to show that it cannot be done without creating a nuisance.[6]

8. *Inevitable Accident.*

The question now to be considered is **whether an action lies against me for harm resulting by inevitable accident from an act lawful in itself, and done by me in a reasonable and careful manner.**

Inevitable accident does not mean absolutely inevitable (for by the supposition I was not bound to act at all), but it **means not avoidable by any such precaution as a reasonable man, doing such an act then and there, could be expected to take.**

We believe that our modern law supports the view now indicated as the rational one, that **inevitable accident is not a ground of liability.**[7] But there is a good deal of appearance of authority in the older books for the contrary proposition that a man must answer for all direct consequences of his voluntary acts at any rate.

9. *Exercise of Common Rights.*

The rule of law is that **the exercise of ordinary rights for a lawful purpose and in a lawful manner, is no wrong even if it causes damage.**

Competition in business, for example, is in itself no ground of action, whatever damage it may cause.[8] A trader can complain of his rival only if a definite exclusive right, such as a patent right, or the right to a trademark, is infringed, or if there is a wilful attempt to damage his business by injurious falsehood ("slander of title") or acts otherwise unlawful in themselves.

Another group of authorities of the same class is that

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6. See note Webb's Pollock's Torts, 153 *et seq.*

7. The Nitro Glycerine Case, 15 Wall. 524; Burdick on Torts (3d Ed.), 66, 67, where the subject is well treated and the cases considered.

8. See the classical case in the Year Book of Hen. IV, Hil. 11; Hen. IV, 47, pl. 21 (A. D. 1410-11). For an historical treatment from the above case down to date, see Pollock on Torts (Webb's Ed.), 174 *et seq.* and cases cited.

which establishes "**that the disturbance or removal of the soil in a man's own land, though it is the means (by process of natural percolation) of drying up his neighbor's spring or well, does not constitute the invasion of a legal right**, and will not sustain an action.'"

There are many other ways in which a man may use his own property to the prejudice of his neighbor, and yet no action lies. I have no remedy against a neighbor who opens a new window so as to overlook my garden: on the other hand he has none against me if, at any time before he has gained a prescriptive right to the light, I build a wall or put up a screen so as to shut out his view from that window.[1] But the principle in question is not confined to the use of property. It extends to every exercise of lawful discretion in a man's own affairs.

Again, our law does not in general recognize any exclusive right to the use of a name, personal or local. I may use a name similar to that which my neighbor uses—and that whether I inherited or found it, or have assumed it of my own motion—so long as I do not use it to pass off my wares or business as being his.[2] The fact that inconvenience arises from the similarity will not of itself constitute a legal injury, and allegations of pecuniary damage will not add any legal effect. "You must have in our law injury as well as damage."

10. *Leave and License.*

Harm suffered by consent is, within limits to be mentioned, not a cause of civil action. The same is true where it is met with under conditions manifesting acceptance, on the part of the person suffering it, of the risk of that kind of harm. The maxim by which the rule is commonly brought to mind is *volenti non fit injuria*.[3] "Leave and license" is the current English phrase for the defence raised in this class of cases.

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9. Burdick on Torts, 71 *et seq.*

1. Id., 71.

2. See, however, as to Trade Marks, Burdick on Torts (3d Ed.), 440.

3. No injury is done to one who consents. See the law on this subject stated and the cases considered in Burdick on Torts (3d Ed.), 93 *et seq.*

The case of **express consent** is comparatively rare in our books, except in the form of a license to enter upon land.

Force to the person is rendered lawful by consent in such matters as surgical operations. In the case of a person under the age of discretion, the consent of that person's parent or guardian is generally necessary and sufficient.[4]

But consent alone is not enough to justify what is on the face of it bodily harm. There must be some kind of just cause, as the cure or extirpation of disease in the case of surgery. Wilful hurt is not excused by consent or assent if it has no reasonable object. Thus if a man licenses another to beat him, not only does this not prevent the assault from being a punishable offense, but the better opinion is that it does not deprive the party beaten of his right of action.

Agreement will not justify the wilful causing or endeavoring to cause appreciable bodily harm for the mere pleasure of the parties or others. Boxing with properly padded gloves is lawful, because in the usual course of things harmless. Fighting with the bare fist is not. Foot-ball is a lawful pastime, though many kicks are given and taken in it; a kicking match is not.[5]

A blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling does not involve an assault, nor does boxing with gloves in the ordinary way.[6]

A license obtained by fraud is of no effect.

Trials of strength and skill in such pastimes as those above mentioned afford, when carried on within lawful bounds, the best illustration of the principle by which the maxim *volenti non fit iniuria* is enlarged beyond its literal

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4. See Stephen's Dig. Cr. Law, art. 204.

5. See Com. v. Collberg, 119 Mass. 350, and 20 Am. Rep. 328 and cases cited.

6. See next note, *supra*.

meaning. A man cannot complain of harm (within the limits we have mentioned) to the chances of which he has exposed himself with knowledge and of his free will.[7]

This distinction should be remembered that **where the plaintiff has voluntarily put himself in the way of risk the defendant is not bound to disprove negligence.** If I choose to stand near a man using an axe, he may be a good woodman or not; but I cannot (it is submitted) complain of an accident because a more skilled woodman might have avoided it. This, or even more, is implied in the decision in Ilott v. Wilkes,[8] where it was held that one who trespassed in a wood, having notice that spring-guns were set there, and was shot by a spring-gun, could not recover. The maxim *volenti non fit injuria* was expressly held applicable: "he voluntarily exposes himself to the mischief which has happened."

11. *Works of Necessity.*

A class of exceptions as to which there is not much authority is that of **acts done of necessity to avoid a greater harm, and on that ground justified.**[9]

Pulling down houses to stop a fire and **casting goods overboard,** or otherwise sacrificing property **to save a ship** or the lives of those on board, are the regular examples.[1] It is said, also, that "in time of war one shall justify **entry on another's land to make a bulwark** in defense of the king and the kingdom." In these cases the apparent wrong "sounds for the public good."

There are also circumstances in which **a man's property or person may have to be dealt with promptly for his own obvious good,** but his consent, or the consent of any one having lawful authority over him, cannot be obtained in time. Here it is evidently justifiable to do what needs to be done, in a proper and reasonable manner of course. It is not even technically a trespass if I throw water on my

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7. See note, *supra.*
8. 3 B. & Ald. 304.
9. Dyer, 36 b; Burdick on Torts, 57.
1. Mouse's Case, 12 Co. Rep. 63.

neighbor's goods to save them from fire, or, seeing his house on fire, enter on his land to help in putting it out. Nor is it an assault for the first passer-by to pick up a man rendered insensible by an accident, or for a competent surgeon, if he perceives that an operation ought forthwith to be performed to save the man's life, to perform it without waiting for him to recover consciousness and give his consent. These works of charity and necessity must be lawful as well as right.[2]

12. *Private Defence.*

Self-defence (or rather private defence, for defence of one's self is not the only case) is another ground of immunity. To repel force by force is the common instinct of every creature that has means of defence. And **when the original force is unlawful, this natural right or power of man is allowed,** nay approved, by the law. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated; in many cases it is a moral duty. **The right extends not only to the defence of a man's own person, but to the defence of his property or possession. And what may be lawfully done for one's self in this regard may likewise be done for a wife or husband, a parent or child, a master or servant.**[3]

The force employed must not be out of proportion to the apparent urgency of the occasion. The person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary. It is said that a man attacked with a deadly weapon must retreat as far as he safely can before he is justified in defending himself by like means. But this probably applies (so far as it is the law) only to criminal liability. On the other hand if a man presents a pistol at my head and threatens to shoot me, peradventure the pistol is not loaded or is not in working order, but I shall do no wrong before the law by acting on the supposition that it is really loaded and capable of shooting.[4]

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2. Consult the unabridged text and notes, Webb's Edition, Pollock on Torts, 199, 200.

3. Burdick on Torts, 59 *et seq.*

4. Id., 63.

Cases have arisen on **the killing of animals in defence of one's property. Here, as elsewhere, the test is whether the party's act was such as he might reasonably, in the circumstances, think necessary for the prevention of harm** which he was not bound to suffer.[5]

Injuries received by an innocent third person from an act done in self-defence, must be dealt with on the same principle as accidental harm proceeding from any other act lawful in itself. It has to be considered, however, that a man repelling imminent danger cannot be expected to use as much care as he would if he had time to act deliberately.[6]

A man cannot, however, justify doing for the protection of his own property, a deliberate act whose evident tendency is to cause, and which does cause, damage to the property of an innocent neighbor.

13. *Plaintiff a Wrong-doer.*

Language is to be met with in some books to the effect that a man cannot sue for any injury suffered by him at a time when he is himself a wrong-doer. But there is no such general rule of law. If there were, one consequence would be that an occupier of land (or even a fellow-trespasser) might beat or wound a trespasser without being liable to an action, whereas the right of using force to repel trespass to land is strictly limited; or if a man is riding or driving at an incautiously fast pace, anybody might throw stones at him with impunity. And generally, "a trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained.[7] **It does not appear on the whole that a plaintiff is disabled from recovering by reason of being himself a wrong-doer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction;** and even then it is difficult to find a case where it is necessary to assume any special rule of this kind.

In America there has been a great question, upon which

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5. Burdick on Torts, 64 *et seq.*

6. See *ante*, Inevitable Accident.

7. Bird v. Holbrook, 4 Bing. 628;

there have been many contradictory decisions, whether the violation of statutes against Sunday traveling is in itself a bar to actions for injuries received in the course of such traveling through defective condition of roads, negligence of railway companies, and the like. In Massachusetts it has been held that a plaintiff in such circumstances cannot recover, although the accident might just as well have happened on a journey lawful for all purposes.[8] These decisions are not generally considered good law, and have been expressly dissented from in some other States.[9]

It is a rule not confined to actions on contracts that **" the plaintiff cannot recover where in order to maintain his supposed claim he must set up an illegal agreement (or illegal conduct) to which he himself has been a party; "** but its application to actions of tort is not frequent or normal.[1]

CHAPTER V.

OF REMEDIES FOR TORTS.

At common law there were only two kinds of redress for an actionable wrong. One was in those cases—exceptional cases according to modern law and practice—where it was and is lawful for the aggrieved party, as the common phrase goes, **to take the law into his own hands.** The other way was **an action for damages.** Not that a suitor might not obtain, in a proper case, other and more effectual redress than money compensation; but he could not have it from a court of common law. Specific orders and prohibitions in the form of injunctions or otherwise were (with few exceptions, if any) in the hand of the Chancellor alone, and the principles according to which they were granted or withheld were counted among the mysteries of Equity.

Barnes v. Ward, 9 Q. B. 392; Hooker v. Miller, 37 Ia. 613.

8. Bosworth v. Swansey, 10 Met. 363.

9. See Burdick on Torts (3d Ed.), 102; Sutton v. Wauwatosa, 29 Wisc. 21; s. c. Big. Lead. Cas., Torts, 711, 721, note.

1. Burdick on Torts (3d Ed.), 103.

But no such distinctions exist under the system of the Judicature Acts, and every branch of the Court has power to administer every remedy.

Remedies available to a party by his own act alone may be included, after the example of the long-established German usage, in the expressive name of *self-help*. The right of private defence appears at first sight to be an obvious example of this. But it is not so, for there is no question of remedy in such a case. We are allowed to repel force by force "not for the redress of injuries, but for their prevention."[1] It is only when the party's lawful act restores to him something which he ought to have, or puts an end to a state of things whereby he is wronged, or at least puts pressure on the wrong-doer to do him right, that self-help is a true remedy. And then it is not necessarily a complete or exclusive remedy.

The acts of this nature which we meet with in the law of torts are **expulsion of a trespasser, retaking of goods**[2] by the rightful possessor, **distress of cattle damage feasant,**[3] and **abatement of nuisances.**[4] **Peaceable re-entry upon land** where there has been a wronful change of possession might be added to the list; but it hardly occurs in modern experience. Analogous to the right of retaking goods is the right of **appropriating or retaining debts** under certain conditions; and various forms of **lien** are more or less analogous to distress. These, however, belong to the domain of contract. In every case alike the right of the party is subject to the rule that **no greater force must be used, or damage done to property, than is necessary** for the purpose in hand.[5]

Remedies by the act of the law. The most frequent and familiar of these is the **awarding of damages.** Whenever an actionable wrong has been done, the party wronged is entitled to recover damages. His title to recover is a conclusion of law from the facts determined in the cause. How much he shall recover is a matter of judicial discretion, a

1. See *ante*, Self-defense.
2. Burdick on Torts, 62.
3. Id., 226.
4. Id., 226.
5. See, generally, as to redress by a party's own act, Cooley on Torts (Students' Ed.), 108-121.

discretion exercised, if a jury tries the cause, by the jury under the guidance of the judge.[6]

Damages may be nominal, ordinary, or exemplary. Nominal damages are a sum of so little value as compared with the cost and trouble of suing that it may be said to have "no existence in point of quantity," such as a shilling or a penny, which sum is awarded with the purpose of not giving any real compensation. Such a verdict means one of two things. According to the nature of the case it may be honorable or contumelious to the plaintiff. Either the purpose of the action is merely to establish a right,[7] no substantial harm or loss having been suffered, or else the jury, while unable to deny that some legal wrong has been done to the plaintiff, have formed a very low opinion of the general merits of his case.[8] This again may be on the ground that the harm he suffered was not worth suing for, or that his own conduct had been such that whatever he did suffer at the defendant's hands was morally deserved. The former state of things, where the verdict really operates as a simple declaration of rights between the parties, is most commonly exemplified in actions of trespass brought to settle disputed claims to rights of way, rights of common, and other easements and profits. The other kind of award of nominal damages, where the plaintiff's demerits earn him an illusory sum such as one farthing, is illustrated chiefly by cases of defamation, where the words spoken or written by the defendant cannot be fully justified, and yet the plaintiff has done so much to provoke them, or is a person of such generally worthless character, as not to deserve, in the opinion of the jury, any substantial compensation.[9]

Infringements of absolute rights like those of personal security and property give a cause of action without regard to the amount of harm done, or to there being harm estimable at any substantial sum at all. As Holt, C. J., said, in a

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6. Id., 121. As to remedies in equity and admiralty, see Id., 121, 122.

7. Burdick on Torts, 230.

8. Id., 231.

9. See, generally, as to nominal damages, Hale on Damages (2d Ed.), ch. 2.

celebrated passage of his judgment in **Ashby v. White,**[1] **"a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right."**

On the other hand, **there are cases,** even in the law of property, **where, as it is said, damage is the gist of the action,** and there is not an absolute duty to forbear from doing a certain thing, but only not to do it so as to cause actual damage.[2] **The right to the support of land** as between adjacent owners, or as between the owner of the surface and the owner of the mine beneath, is an example. My neighbor may excavate in his own land as much as he pleases, unless and until there is actual damage to mine; then, and not till then, a cause of action arises for me. **Negligence,** again, is a cause of action only for a person who suffers actual harm by reason of it. The same rule holds of **nuisances.** So, in an action of **deceit,** the cause of action is the plaintiff's having suffered damage by acting on the false statement made to him by the defendant. In all these cases there can be no question of nominal damages, the proof of real damage being the foundation of the plaintiff's right.

In the law of slander some kinds of spoken defamation are actionable without any allegation or proof of special damage (in which case the plaintiff is entitled to nominal damages at least), and others not; while as to written words no such distinction is made.

Ordinary damages are a sum awarded as a fair measure of compensation to the plaintiff, the amount being, as near as can be estimated, that by which he is the worse for the defendant's wrong-doing, but in no case exceeding the amount claimed by the plaintiff himself. **Compensation, not restitution, is the proper test.**[3]

One step more, and we come to cases where there is **great injury without the possibility of measuring compensation by any numerical rule,** and juries have been not only allowed but encouraged to give damages that express indignation

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1. 2 Lord Raym. 938, 955. See s. c., 1 Smith's Lead. Cases, *342 and notes.

2. See Burdick on Torts (3d Ed.), 231.

3. Burdick on Torts, 231; Hale on Damages (2d Ed.), ch. 3.

at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called **exemplary or vindictive.**[4] The kind of wrongs to which they are applicable are those which, besides the violation of a right or the actual damage, import **insult or outrage**, and so are not merely injuries, but *iniurioe* in the strictest Roman sense of the term. **An assault and false imprisonment** under color of a pretended right in breach of the general law, and against the liberty of the subject; **a wanton trespass on land**, persisted in with violent and intemperate behavior; the **seduction** of a man's daughter with deliberate fraud, or otherwise under circumstances of aggravation,—such are the acts which, with the open approval of the Courts, juries have been in the habit of visiting with exemplary damages. **Gross defamation** should perhaps be added; but there is rather that no definite principle of compensation can be laid down than that damages can be given which are distinctly not compensation. It is not found practicable to interfere with juries either way, unless their verdict shows manifest mistake or improper motive.

There are other **miscellaneous examples of an estimate of damages colored**, so to speak, **by disapproval of the defendant's conduct** (and in the opinion of the court legitimately so), though it be not a case for vindictive or exemplary damages in the proper sense. In an action for **trespass to land or goods** substantial damages may be recovered, though no loss or diminution in value of property may have occurred. In an action for **negligently pulling down buildings** to an adjacent owner's damage, evidence has been admitted that the defendant wanted to disturb the plaintiff in his occupation, and purposely caused the work to be done in a reckless manner; and it was held that the judge might properly authorize a jury to take into consideration the words and conduct of the defendant "showing a contempt of the plaintiff's rights and of his convenience."

The action for breach of promise of marriage, being an action of contract, is not within the scope of this work; but

4. Burdick on Torts, 232-234; Hale on Damages, ch. 7.

it has curious points of affinity with actions of tort in its treatment and incidents; one of which is that a very large discretion is given to the jury as to damages.[5]

As **damages** may be aggravated by the defendant's ill-behavior or motives, so they **may be reduced by proof of provocation**, or of his having acted in **good faith**; and many kinds of circumstances which will not amount to justification or excuse are for this purpose admissible and material.[6] "In all cases where **motive** may be ground of aggravation, evidence on this score will also be admissible in reduction of damages."

"**Damages resulting from one and the same cause of action must be assessed and recovered once for all;**" but where the same facts give rise to two distinct causes of action, though between the same parties, action and judgment for one of these causes will be no bar to a subsequent action on the other.[7]

Another remedy which is not, like that of damages, universally applicable, but which is applied to many kinds of wrongs where the remedy of damages would be inadequate or practically worthless, is the granting of an **injunction to restrain the commission of wrongful acts threatened, or the continuance of a wrongful course of action already begun.** The kinds of tort against which this remedy is commonly sought are nuisances, violations of specific rights of property in the nature of nuisances, such as obstruction of light and disturbance of easements, continuing trespasses, and infringements of copyright and trade-marks.

The cases in which an injunction will be granted are all of them developments of the one general principle that **an injunction is granted [8] only where damages would not be an adequate remedy**, and an interim injunction only where delay would make it impossible or highly difficult to do complete justice at a later stage.

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5. Exemplary damages may be recovered for breach of promise of marriage. Hale on Damages (2d Ed.), 310, 529.

6. Hale on Damages, 527.

7. Brunsden v. Humphrey, 14 Q. B. Div. 141.

8. See, generally, as to injunctions in cases of torts, Burdick on Torts (3d Ed.), ch. 17.

In certain cases of fraud (that is, wilfully or recklessly false representation of fact), the Court of Chancery had before the Judicature Act concurrent jurisdiction with the courts of common law, and would award pecuniary compensation,[9] not in the name of damages indeed, but by way of restitution or "making the representation good." In substance, however, the relief came to giving damages under another name, and with more nicety of calculation than a jury would have used.

Duties of a public nature are constantly defined or created by statute, and generally, though not invariably, special modes of enforcing them are provided by the same statutes. **If the Legislature, at the same time that it creates a new duty, points out a special course of private remedy for the person aggrieved** (for example, an action for penalties to be recovered, wholly or in part, for the use of such person), **then it is generally presumed that the remedy so provided was intended to be, and is, the only remedy.**[1] The provision of a public remedy without any special means of private compensation is in itself inconsistent with a person specially aggrieved having an independent right of action for injury caused by a breach of the statutory duty. And it has been thought to be a general rule that where the statutory remedy is not applicable to the compensation of a person injured, that person has a right of action. But the Court of Appeals has repudiated any such fixed rule, and has laid down that the possibility or otherwise of a private right of action for the breach of a public statutory duty must depend on the scope and language of the statute taken as a whole.[2]

Also **the harm in respect of which an action is brought for the breach of statutory duty must be of the kind which the statute was intended to prevent.** If cattle being carried on a ship are washed overboard for want of appliances prescribed by an Act of Parliament for purely sanitary purposes, the shipowner is not liable to the owner of the cattle

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9. Burrowes v. Lock, 10 Ves. 470.

1. Cole v. Muscatine, 14 Iowa, 296; note. Webb's Edition, Pollock on Torts, 228.

2. Atkinson v Waterworks Co., 2 Ex. Div. 441.

by reason of the breach of the statute;[3] though he will be liable if his conduct amounts to negligence apart from the statute and with regard to the duty of safe carriage which he has undertaken, and in an action not founded on a statutory duty the disregard of such a duty, if likely to cause harm of the kind that has been suffered, may be a material fact.[4]

Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage, and it does not matter whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories. **But when the plaintiff in such a case has made his choice, he is concluded by it.** After recovering judgment against some one of the joint authors of a wrong, he cannot sue the other or others for the same matter, even if the judgment in the first action remains unsatisfied.[5] (In the United States there is no bar till satisfaction.)

As between joint wrong-doers themselves, one who has been sued alone and compelled to pay the whole damages has no right to indemnity or contribution from the other, if the nature of the case is such that he "must be presumed to have known that he was doing an unlawful act." Otherwise, "where the matter is indifferent in itself," and the wrongful act is not clearly illegal, but may have been done in honest ignorance, or in good faith to determine a claim of right, there is no objection to contribution or indemnity being claimed. The proposition that there is no contribution between wrong-doers must be understood to affect only those who are wrong-doers in the common sense of the word as well as in law. The wrong must be so manifest that the person doing it could not at the time reasonably suppose that he was acting under lawful authority.[6]

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3. Gorris v. Scott, L. R. 9 Ex. 125.
4. Id., p. 131.
5. In the United States there is no bar till satisfaction. Cooley on Torts (Students' Ed.), 100.
6. See Cooley on Torts (Students' Ed.), 104-107.

It has been currently said, sometimes laid down, and once or twice acted on as established law, that **when the facts affording a cause of action in tort are such as to amount to a felony, there is no civil remedy** against the felon for the wrong,—at all events before the crime has been prosecuted to conviction. And as, before 1870,[7] a convicted felon's property was forfeited, there would at common law be no effectual remedy afterwards. So that the compendious form in which the rule was often stated, that "the trespass was merged in the felony," was substantially if not technically correct. But so much **doubt has been thrown upon the supposed rule** in several recent cases, that it seems, if not altogether exploded, to be only awaiting a decisive abrogation.[8]

Locality of wrongs.[9] **No action can be maintained in respect of an act committed beyond the territorial jurisdiction of the court, which is justified or excused according to both English and local law.** Besides this obvious case, the following states of things are possible:—

1. **The act may be such that, although it may be wrongful by the local law, it would not be a wrong if done in England. In this case no action lies in an English court:** [1]

2. **The act, though in itself it would be a trespass by the law of England, may be justified or excused by the local law. Here also there is no remedy in an English court.**[2] And it makes no difference whether the act was from the first justifiable by the local law, or, not being at the time justifiable, was afterwards ratified or excused by a declaration of indemnity proceeding from the local sovereign

7. 33 & 34 Vict., c. 23.

8. "The great majority of our judicial tribunals have held that 'for an act which happens to be both a public and a private wrong, the public and the party aggrieved each has a concurrent remedy, the former by indictment and the latter by an action suited to the particular circumstances of his case.'" Burdick on Torts (3d Ed.), 25, citing Foster v. Com., 8 W. & S. 77.

9. See, generally, note Webb's Edition, Pollock on Torts, 238-9; Burdick on Torts (3d Ed.). 247-251.

1. The Halley, L. R. 2 P. C. 193, 204.

2. Blad's Case, Blad v. Barnfield, 3 Swanst. 603-4; The M. Moxlam. 1 P. Div. 107; Phillips v. Eyre, Ex. Ch. L. R. 6 Q. B. 1.

power. But nothing less than justification by the local law will do. Conditions of the *lex fori* suspending or delaying the remedy in the local courts will be a bar to the remedy in an English court in an otherwise proper case. And our courts would possibly make an exception to the rule if it appeared that by the local law there was no remedy at all for a manifest wrong, such as assault and battery committed without any special justification or excuse.

3. **The act may be wrongful by both the law of England and the law of the place where it was done. In such a case an action lies in England, without regard to the nationality of the parties,**[3] **provided the cause of action is not of a purely local kind,** such as trespass to land.

The times in which actions of tort must be brought are fixed by the Statute of Limitation of James I. (21 Jac. 1, c. 16) as modified by later enactment.[4] (The student should in this connection consult the statute of his own State, as the statutes of limitations are not uniform.)

Persons who at the time of their acquiring a cause of action are infants, married women, or lunatics, have the period of limitation reckoned against them only from the time of the disability ceasing; and if a defendant is **beyond seas** at the time of the right of action arising, the time runs against the plaintiff only from his return.[5]

Where damage is the gist of the action, the time runs only from the actual happening of the damage.

The operation of the Statute of Limitations is further subject to the **exception of concealed fraud,** derived from the doctrine and practice of the Court of Chancery. Where a wrong-doer fraudulently conceals his own wrong, **the period of limitation runs only from the time when the plaintiff discovers the truth,** or with reasonable diligence would discover it.

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3. The Halley, L. R. 2 P. C. 202.

4. The student should in this connection consult the statute of his own state as the statutes of limitations are not uniform.

5. These provisions are generally contained in the statutes of the several states. See, generally, Wood on Limitations of Actions (1901); Burwell, id., 1889.

BOOK II.

SPECIFIC WRONGS.

CHAPTER VI.

PERSONAL WRONGS.

1. *Assault and Battery.*

The application of unlawful force to another constitutes the wrong called battery; an action which puts another in instant fear of unlawful force, though no force be actually applied, is the wrong called assault. These wrongs are likewise indictable offences.

"**The least touching of another in anger is a battery;**"[1] "for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it." It is immaterial not only whether the force applied be sufficient in degree to cause actual hurt, but whether it be of such a kind as is likely to cause it. Again it does not matter whether the force used is applied directly or indirectly, to the human body itself or to anything in contact with it; nor whether with the hand or anything held in it, or with a missile.

Battery includes assault, and though assault strictly means an inchoate battery, the word is in modern usage constantly made to include battery. The essence of the wrong of assault is putting a man in present fear of violence, so that any act fitted to have that effect on a reasonable man may be an assault, though there is no real present ability to do the harm threatened.[2] Acts capable in themselves of being an assault may be explained or qualified by words or circumstances contradicting what might otherwise be inferred from them. A man put his hand on his sword and said, "If it were not assize-time, I would not

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1. Cole v. Turner, 6 Mod. 149, per Holt, C. J.; Big. Lead. Cas., 218. See, generally, Burdick on Torts (3d Ed.), ch. 8.

2. Burdick on Torts, 303.

take such language from you; " this was no assault, because the words excluded an intention of actually striking.[3]

Hostile or unlawful intention is necessary to constitute an indictable assault; and such touching, pushing, or the like as belongs to the ordinary conduct of life, and is free from the use of unnecessary force, is neither an offence nor wrong.

Mere passive obstruction is not an assault, as where a man by standing in a doorway prevents another from coming in.

Words cannot of themselves amount to an assault under any circumstances.[4]

Consent, or in the common phrase " leave and license," will justify many acts which would otherwise be assaults, striking in sport, for example; or even, if coupled with reasonable cause, wounding and other acts of a dangerous kind, as in the practice of surgery. **But consent will not make acts lawful which are a breach of the peace,** or otherwise criminal in themselves, or unwarrantably dangerous.

It has been repeatedly held in criminal cases of assault that **an unintelligent assent, or a consent obtained by fraud, is of no effect.**[5] The same principles would no doubt be applied by courts of civil jurisdiction if necessary.

When one is wrongfully assaulted it is lawful to repel force by force (as also to use force in the defence of those whom one is bound to protect, or for keeping the peace, provided that no unnecessary violence be used. **How much force, and of what kind,** it is reasonable and proper to use in the circumstances **must always be a question of fact.** The resistance must " not exceed the bounds of mere defence and prevention," or the force used in defence must be not more than " commensurate " with that which provoked it.[6]

Menace without assault is in some cases actionable. But this is on the ground of its causing a certain special kind

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3. Tuberville v. Savage, 1 Mod. 3.

4. Wash. Cr. Law (2d Ed.), 27; 2 Bish. Cr. Law (7th Ed.), § 25.

5. See, however, Wash. Cr. Law (2d Ed.), 93; 2 Bish. Cr. Law (7th Ed.), §§ 1120, 1122. See Burdick on Torts (3d Ed.), 93.

6. As to self-defence, see Wash. Cr. Law (2d Ed.), 81 *et seq.*

of damage; and then the person menaced need not be the person who suffers damage. In fact the old authorities are all, or nearly all, on intimidation of a man's servants or tenants whereby he loses their service or dues. **Verbal threats of personal violence are not, as such, a ground, of civil action at all.** If a man is thereby put in reasonable bodily fear he has his remedy, but not a civil one, namely, by security of the peace.

2. *False Imprisonment.*

Freedom of the person includes immunity not only from the actual application of force, but from every kind of detention and restraint not authorized by law. The infliction of such restraint is the wrong of false imprisonment; which, though generally coupled with assault, is nevertheless a distinct wrong. Laying on of hands or other actual constraint of the body is not a necessary element. "**Every confinement of the person is an imprisonment,** whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.[7] And when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is. **The detainer, however, must be such as to limit the party's freedom of motion in all directions.** It is not an imprisonment to obstruct a man's passage in one direction only. A man is not imprisoned who has an escape open to him; that is, a means of escape which a man of ordinary ability can use without peril of life or limb.

When an action for false imprisonment is brought and defended, the real question in dispute is mostly, though not always, whether the imprisonment was justified. We have considered, under the head of General Exceptions, the principles on which persons acting in the exercise of special duties and authorities are entitled to absolute or qualified immunity. With regard to the lawfulness of arrest and

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7. Burdick on Torts (3d Ed.), 275. This has been the law from time immemorial. See Year Book of Assizes, f. 104, pl. 85 (1348), per Thorpe, C. J.

imprisonment in particular, there are divers and somewhat minute **distinctions between the powers of a peace-officer and those of a private citizen**; of which the chief is that **an officer may without a warrant arrest on reasonable suspicion of felony, even though a felony has not in fact been committed, whereas a private person so arresting, or causing to be arrested, an alleged offender, must show not only that he had reasonable grounds of suspicion, but that a felony had actually been committed.**[8]

Every one is answerable for specifically directing the arrest or imprisonment of another, as for any other act that he specifically commands or ratifies; and a superior officer who finds a person taken into custody by a constable under his orders, and then continues the custody, is liable to an action if the original arrest was unlawful. Nor does it matter whether he acts in his own interest or another's. But one is not answerable for acts done upon his information or suggestion by an officer of the law, if they are done not as merely ministerial acts, but in the exercise of the officer's proper authority or discretion. **A party who sets the law in motion** without making its act his own is not necessarily free from liability. He may be liable for malicious prosecution; but he cannot be sued for false imprisonment, or in a court which has not jurisdiction over cases of malicious prosecution.

What is reasonable cause of suspicion to justify arrest is —paradoxical as the statement may look—neither a question of law nor of fact. Not of fact, because it is for the judge and not for the jury; not of law, because "no definite rule can be laid down for the exercise of the judge's judgment." **It is matter of judicial discretion,** such as is familiar enough in the classes of cases which are disposed of by a judge sitting alone. The only thing which can be certainly affirmed in general terms about the meaning of "reasonable cause" in this connection is that on the one hand **a belief honestly entertained is not of itself enough;** on the other hand, **a man is not bound to wait until he is in**

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8. Where not changed by statute this is the general rule of law. Burdick on Torts (3d Ed.), 280; Wash. Cr. Law (2d Ed.), 176.

possession of such evidence as would be admissible and sufficient for prosecuting the offense to conviction, or even of the best evidence which he might obtain by further inquiry. "It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so." It is obvious, also, that the existence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time.[9]

3. *Injuries in Family Relations.*

The development of the law upon this subject has been strangely halting and one-sided. Sarting from the particular case of a hired servant, the authorities have dealt with other relations, not by openly treating them as analogous in principle, but by importing into them the fiction of actual service; with the result that in the class of cases most prominent in modern practice, namely, **actions brought by a parent (or person in loco parentis)[1] for the seduction of a daughter, the test of the plaintiff's right has come to be, not whether he has been injured as the head of a family, but whether he can make out a constructive "loss of service."**[2]

The common law provided a remedy by writ of trespass for the actual taking away of a wife, servant, or heir, and perhaps younger child also. **An action of trespass also lay for wrongs done to the plaintiff's wife or servant (not to a child as such), whereby he lost the society of the former or the services of the latter.** The language of pleading was *per quod consortium,* or *servitium, amisit.*[3] Such a cause of action was quite distinct from that which the husband might acquire in right of the wife, or the servant in his own right. The trespass is one, but the remedies are "*diversis respectibus.*" "If my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have

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9. See Wash. Cr. Law (2d Ed.), 177; Burdick on Torts (3d Ed.), 280. Consult the unabridged text of Pollock on Torts, Webb's Edition, 267.

1. In the place of the parent.
2. Burdick on Torts (3d Ed.), 319.
3. Whereby he lost the service.

an action; and the reason of this difference is that the master has not any damage by the personal beating of his servant, but by reason of a *per quod,* namely, *per quod servitium, &c. amisit;* so that the original act is not the cause of his action, but the consequent upon it, namely, the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action." The same rule applies to the beating of mal-treatment of a man's wife, provided it be "very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife."[4]

Against an adulterer the husband had an action at common law, commonly known as an action of criminal conversation. In form it was generally trespass *vi et armis,* on the theory that "a wife is not, as regards her husband, a free agent or separate person," and therefore her consent was immaterial, and the husband might sue the adulterer as he might have sued any mere trespasser who beat, imprisoned, or carried away his wife against her will.[5]

An action also lay for enticing away a servant (that is, procuring him or her to depart voluntarily from the master's service),[6] **and also for knowingly harboring a servant** during breach of service; whether by the common law, or only after and by virtue of the Statute of Laborers,[7] is doubtful.

Much later the experiment was tried with success of a husband bringing a like action "against such as persuade and entice the wife to live separate from him without a sufficient cause."

Still later the action for enticing away a servant per quod servitium amisit, was turned to the purpose for which alone it may now be said to survive, that of punishing seducers; for the latitude allowed in estimating damages makes the proceeding in substance almost a penal one.

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4. Such is still the ground of this action. Burdick on Torts (3d Ed.), 310, 319 *et seq.*

5. See Cooley on Torts (Students' Ed.), ch. 7; Burdick on Torts (3d Ed.), 311.

6. Fitzherbert, *Natura Brevium,* 91, I; Burdick on Torts (3d Ed.), 322.

7. 23 Edw. 3 (A. D. 1349).

In this kind of action it is **not necessary to prove the existence of a binding contract of service** between the plaintiff and the person seduced or enticed away. The presence or absence of seduction in the common sense (whether the defendant "debauched the plaintiff's daughter," in the forensic phrase) makes no difference in this respect; it is not a necessary part of the cause of action, but only a circumstance of aggravation. Whether that element be present or absent, **proof of a de facto relation of service is enough**; and any fraud whereby the servant is induced to absent himself or herself affords a ground of action, "when once the relation of master and servant at the time of the acts complained of is established."

And a de facto service is not the less recognized because a third party may have a paramount claim; a married woman living apart from her husband in her father's house may be her father's servant, even though that relation might be determined at the will of the husband. Some evidence of such a relation there must be, but very little will serve. "**The right to the service is sufficient.**"

Partial attendance in the parent's house is enough to constitute service, as where a daughter employed elsewhere in the daytime is, without consulting her employer, free to assist, and does assist, in the household when she comes home in the evening.

Some loss of service, or possibility of service, must be shown as consequent on the seduction;[8] but when that condition is once satisfied, **the damages that may be given are by no means limited to an amount commensurate with the actual loss of service** proved or inferred. The awarding of **exemplary damages** is indeed rather encouraged than otherwise. It is immaterial whether the plaintiff be a parent or kinsman, or a stranger in blood who has adopted the person seduced.

On the same principle or fiction of law a parent can sue in his own name for any injury done to a child living under

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8. Rist v. Faux, Ex. Ch. 4 B. & S. 409; Cooley on Torts (Students' Ed.), 261, 262. In Kansas the fiction of service has been disregarded. Anthony v. Norton, 60 Kan. 341.

his care and control, provided the child is old enough to be capable of rendering service; otherwise not, for " the gist of the action depends upon the capacity of the child to perform acts of service.[9]

The capricious working of the action for seduction in modern practice has often been the subject of censure. Thus, Serjeant Manning wrote forty years ago; " the *quasi* fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers." [1]

CHAPTER VII.

DEFAMATION.

The wrong of defamation may be committed either by way of speech, or by way of writing or its equivalent. For this purpose it may be taken that **significant gestures** (as the finger language of the deaf and dumb) are in the same class with **audible words**;[1] and there is no doubt that **printing, engraving, drawing,** and every other use of permanent visible symbols to convey distinct ideas, are in the same case with **writing.**[2] The term **slander** is appropriated to the former kind of utterances, **libel** to the latter. Using the terms " written " and " spoken " in an extended sense, to include the analogous cases just mentioned, we may say that **slander is a spoken and libel is a written defamation.** The law has made a great difference between the two. **Libel is an offence as well as a wrong, but slander is a civil wrong only. Written utterances are, in the absence of special ground of justification or excuse, wrongful as against any person whom they tend to bring into hatred, contempt, or ridicule.**[3] **Spoken words are actionable only when special damage can be proved** to have been their proximate con-

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9. See note, *supra.*
1. Id.
1. Burdick on Torts (3d Ed.), 350.
2. See Burdick on Torts (3d Ed.), 342.
3. Id., 342.

sequence, **or when they convey imputations of certain kinds.**[4]

1. *Slander.*

Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, **and also in the following cases:—**

Where the words impute a criminal offence.[5]

Where they impute having a contagious disease which would cause the person having it to be excluded from society.[6]

Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade, in short, where they manifestly tend to prejudice a man in his calling.[7]

Spoken words which afford a cause of action without proof of special damage are said to be actionable per se.[8]

No such distinctions exist in the case of libel: it is enough to make a written statement prima facie libellous that it is injurious to the character or credit (domestic, public, or professional) of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred, contempt, or ridicule.[9] When we call a statement **prima facie libellous,** we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification or excuse.

Where "special damage" is the ground of action, the damage must be in a legal sense the natural and probable result of the words complained of.[1] It has been said that it must also be "the legal and natural consequence of the words spoken" in this sense, that if A. speaks words in disparagement of B. which are not actionable *per se,* by reason of which speech C. does something to B.'s advantage

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4. Id., 350.

5. Involving moral turpitude. Id., 351.

6. Id., 351.

7. Id., 351. See, generally, Pollard v. Lyon, 91 U. S. 225.

8. Id.

9. Id., 342.

1. Burdick on Torts (3d Ed.), 359. The special loss or injury must be alleged by the plaintiff. Id.; Cooley's Torts (Students' Ed.), 30.

that is itself wrongful as against B. (such as dismissing B. from his service, in breach of a subsisting contract), B. has no remedy against A., but only against C.[2] But this doctrine is contrary to principle: the question is not whether C.'s act was lawful or unlawful, but whether it might have been in fact reasonably expected to result from the original act of A. And, though not directly overruled, it has been disproved by so much and such weighty authority that we may say it is not law. There is authority for the proposition that where spoken words, defamatory but not actionable in themselves, are followed by special damage, the cause of action is not the original speaking, but the damage itself.[3]

It is settled, however, that no cause of action is afforded by special damage arising merely from the **voluntary repetition of spoken words** by some hearer who was not under a legal or moral duty to repeat them. Such a consequence is deemed too remote.[4] But if the first speaker authorized the repetition of what he said, or (it seems) spoke to or in the hearing of some one who in the performance of a legal, official, or moral duty ought to repeat it, he will be liable for the consequences.[5]

Losing the general good opinion of one's neighbors, *consortium vicinorum,* as the phrase goes, **is not of itself special damage.**[6] **A loss of some material advantage must be shown.** Yet the loss of *consortium* as between husband and wife is a special damage of which the law will take notice, and so is the loss of the voluntary hospitality of friends, this last on the ground that a dinner in a friend's house and at his expense is a thing of some temporal value.[7] Trouble of mind caused by defamatory words is not sufficient special damage, and illness consequent upon such trouble is too

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2. Vicars v. Wilcocks (1806), 8 East, 1. See Lumley v. Gye, 2 El. & B. 216; Big. Lead. Cases, 306, 320.

3. See Burdick on Torts (3d Ed.), 359, 7 Q. B. D. 437.

4. Parkins v. Scott, 1 H. & C. 153; Burdick on Torts, 107.

5. Riding v. Smith, 1 Ex. D. 91. As to the person repeating the defamation, however, it is well settled that every repetition of a defamatory statement is a new publication, subjecting the repeater to a separate action. Burdick on Torts (3d Ed.), 336 and cases cited.

6. Burdick on Torts, 359.

7. Burdick on Torts, 359.

remote. "Bodily pain or suffering cannot be said to be the natural result in all persons."

Imputations of criminal offence. Words sued on as imputing crime must amount to a charge of some offence which, if proved against the party to whom it is imputed, would expose him to imprisonment or other corporal penalty[8] (not merely to a fine in the first instance, with possible imprisonment in default of payment).

False accusation of immorality or disreputable conduct not punishable by a temporal court is not actionable per se, however gross.[9]

Little need be said concerning **imputations of contagious disease unfitting a person for society; that is, in the modern law, venereal disease.**[1] The only notable point is that "charging another with having had a contagious order is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails."

Concerning words spoken of a man to his disparagement in his office, profession, or other business: they are actionable on the following conditions: They must be spoken of him in relation to or "in the way of" a position which he holds, or a business he carries on, at the time of speaking. They must either amount to a direct charge of incompetence or unfitness, or impute something so inconsistent with competence or fitness that, if believed, it would tend to the loss of the party's employment or business.[2]

It makes no difference whether the office or profession carries with it any legal right to temporal profit, or in point of law is wholly or to some extent honorary, as in the case of a barrister or a fellow of the College of Physicians. Nor does it matter what the nature of the employment is, pro-

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8. This rule has been variously modified in the United States. As to the various rules. See Burdick on Torts (3d Ed.), 352 *et seq.*

9. Imputing unchastity even to woman was not actionable *per se* at common law, but has been made so in England and in many of our states. Burdick on Torts (3d Ed.), 354.

1. Leprosy and, it is said, the plague, were in the same category. Small-pox is not. See Blake Odgers's Lib., 63; Burdick on Torts (3d Ed.), 355.

2. Burdick on Torts, 356.

vided it be lawful; or whether the conduct imputed is such as in itself the law will blame or not, provided it is inconsistent with the due fulfilment of what the party, in virtue of his employment or office, has undertaken.[3]

There are cases, though not common in our books, in which a man suffers **loss in his business as the intended or "natural and probable result" of words spoken in relation to that business, but not against the man's own character or conduct:** as where a wife or servant dwelling at his place of business is charged with misbehavior, and the credit of the business is thereby impaired. In such a case an action lies, but is not, it seems, properly an action of slander, but rather **a special action on the case** analogous to those which have been allowed for disturbing a man in his calling, or in the exercise of a right in other ways.[4]

2. *Defamation in general.*

We now pass to the general law of defamation, which applies to both slander and libel, subject, as to slander, to the conditions and distinctions we have just gone through. Considerations of the same kind may affect the measure of damages for written defamation, though not the right of action itself.

It is commonly said that defamation to be actionable must be malicious, and the old form of pleading added "maliciously" to "falsely." **Malice, however, in the modern law signifies neither more nor less, in this connection, than the absence of just cause or excuse.**[5]

"**Express malice**" means something different, of which hereafter.

Publication. Evil-speaking, of whatever kind, is not actionable if communicated only to the person spoken of. The cause of action is not insult, but proved or presumed injury to reputation. **Therefore there must be a communi-**

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3. The only limitation is that it does not apply to illegal callings. Id., 358.

4. See Riding v. Smith, 1 Ex. D. 91.

5. Wash. Cr. Law (3d Ed.), 69 and cases cited.

cation by the speaker or writer to at least one third person; and this necessary element of the wrongful act is technically called **publication.** It need not amount to anything like publication in the common usage of the word. That an open message passes through the hands of a telegraph clerk, or a manuscript through those of a compositor in a printing-office, is enough to constitute a publication to those persons if they are capable of understanding the matters so delivered to them.[6] **Every repetition of defamatory words is a new publication, and a distinct cause of action.**[7] The sale of a copy of a newspaper, published (in the popular sense) many years ago, to a person sent to the newspaper office by the plaintiff on purpose to buy it, is a fresh publication.[8]

A person who is **an unconscious instrument in circulating libellous matter,** not knowing or having reason to believe that the document he circulates contains any such matter, **is free from liability** if he proves his ignorance.

On the general principles of liability, a man is deemed to publish that which is published by his authority. And the authority need not be to publish a particular form of words. A general request, or words intended and acted on as such, to take public notice of a matter, may make the speaker answerable for what is published in conformity to the general "sense and substance" of his request.[9]

The construction of words alleged to be libellous (we shall now use this term as equivalent to "defamatory," unless the context requires us to advert to any distinction between libel and slander) is often a matter of doubt. In the first place **the court has to be satisfied that they are capable of the defamatory meaning ascribed to them.** Whether they are so is a question of law.[1] **If they are, and if there is some other meaning which they are also capable of, it is a question of fact which meaning they did convey** under all the circumstances of the publication in question. An averment by the plaintiff that words not libellous in their ordinary

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6. Burdick on Torts, 331 *et seq.*
7. Burdick on Torts, 336.
8. Duke of Brunswick v. Harmer, 14 Q. B. 185.
9. Parker v. Prescott, L. R. 4 Ex. 169.
1. Capital, etc., Bank v. Henty, 7 App. Cas. 741.

meaning or without a special application, were used with a specified libellous meaning or application, is called an **innuendo.**[2]

The actionable or innocent character of words depends not on the intention with which they were published, but on their actual meaning and tendency when published.[3] A man is bound to know the natural effect of the language he uses. Words are not deemed capable of a particular meaning merely because it might by possibility be attached to them: there must be something in either the context or the circumstances that would suggest the alleged meaning to a reasonable mind.

The publication is no less the speaker's or writer's own act, and none the less makes him answerable, because he only repeats what he has heard. Libel may consist in a fair report of statements which were actually made, and on an occasion which then and there justified the original speaker in making them; slander in the repetition of a rumor merely as a rumor, and without expressing any belief in its truth. Circumstances of this kind may count for much in assessing **damages,** but they count for nothing towards determining whether the defendant is liable at all.[4]

3. *Exceptions.*

Nothing is a libel which is a fair comment on a subject fairly open to public discussion. This is a rule of common right, not of allowance to persons in any particular situation,[5] and it is not correct to speak of utterances protected by it as being privileged. The honesty of the critic's belief or motive is nothing to the purpose. The right is to publish such comment as in the opinion of impartial bystanders, as represented by the jury, may fairly arise out of the matter in hand. Whatever goes beyond this, even if well meant, is libellous. One test very commonly applicable is the distinction between action and motive; public acts and per-

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2. As to the office of the innuendo, see Burdick on Torts, 349, 350.

3. 7 App. Cas. 768, 782, 787, 790.

4. Burdick on Torts, 336.

5. Merivale v. Carson, 20 Q. B. 282, per Bowen, L. J.

formances may be freely censured as to their merits or probable consequences, but wicked or dishonest motives must not be imputed upon mere surmise. Such imputations, even if honestly made, are wrongful, unless there is in fact good cause for them.[6]

What acts and conduct are open to public comment is a question for the court, but one of judicial common sense rather than of technical definition. Subject-matter of this kind may be broadly classed under two types.

The matter may be in itself of interest to the common weal, as the conduct of persons in public offices or affairs.[7]

Or it may be laid open to the public by the voluntary act of the person concerned. The writer of a book offered for sale, the composer of music publicly performed, the author of a work of art publicly exhibited, the manager of a public entertainment, and all who appear as performers therein, the propounder of an invention or discovery publicly described with his consent, are all deemed to submit their work to public opinion, and must take the risks of fair criticism; which criticism, being itself a public act, is in like manner open to reply within commensurate limits.[8]

What is actually fair criticism is a question of fact,[9] provided the words are capable of being understood in a sense beyond the fair expression of an unfavorable opinion on that which the plaintiff has submitted to the public.

In literary and artistic usage criticism is hardly allowed to be fair which does not show competent intelligence of the subject-matter. Courts of justice have not the means of applying so fine a test: and a right of criticism limited to experts would be no longer a common right but a privilege.

The right of fair criticism will, of course, not cover untrue statements of alleged specific acts of misconduct.

Defamation is not actionable if the defendant shows that

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6. Id., p. 283.

7. See a learned discussion of this subject in Cooley's Const. Lim. (7th Ed.), 616 *et seq.*, where the cases are fully collected and considered. See, also, Burdick on Torts (3d Ed.), 354-384.

8. Burdick on Torts (3d Ed.), 384.

9. Id.. 385.

the defamatory matter was true; and if it was so, the purpose or motive with which it was published is irrelevant.

What the defendant has to prove is truth in substance, that is, he must show that the imputation made or repeated by him was true as a whole and in every material part thereof. What parts of a statement are material, in the sense that their accuracy or inaccuracy makes a sensible difference in the effect of the whole, is a question of fact.[1]

There may be a further question whether the matter alleged as justification is sufficient, if proved, to cover the whole cause of action arising on the words complained of; and this appears to be a question of law, save so far as it depends on the fixing of that sense, out of two or more possible ones, which those words actually conveyed.[2]

Apparently **it would make no difference in law that the defendant had made a defamatory statement without any belief in its truth**, if it turned out afterwards to have been true when made: as, conversely, it is certain that **the most honest and even reasonable belief is of itself no justification.**

In order that public duties may be discharged without fear, **unqualified protection is given to language used in the exercise of parliamentary and judicial functions.** A member of Parliament cannot be lawfully molested outside Parliament by civil action, or otherwise, on account of anything said by him in his place in either House. An action will not lie against a judge for any words used by him in his judicial capacity in a court of justice. It is not open to discussion whether the words were or were not in the nature of fair comment on the matter in hand, or otherwise relevant or proper, or whether or not they were used in good faith.[3]

Parties, advocates, and witnesses in a court of justice are under the like protection. The only limitation is that the words must in some way have reference to the inquiry the court is engaged in.[4]

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1. Burdick on Torts (3d Ed.), 363. In some states by statute the truth of a libel is not a defence unless published with a good motive and for justifiable ends. Burdick on Torts (3d Ed.), 364.
2. Id.
3. Burdick on Torts (3d Ed.), 364-366.
4. Id., 365.

A duly constituted **military court of inquiry** is for this purpose on the same footing as an ordinary court of justice. So is a **select committee of the House of Commons.** Statements coming within this rule are said to be "**absolutely privileged.**"[5]

The term "**qualified privilege**" is often used to mark the requirement of good faith in cases in which a middle course is taken between the common rule of unqualified responsibility for one's statements, and the exceptional rules which give, as we have just seen, absolute protection to the kinds of statements covered by them.[6] **Fair reports of judicial and parliamentary proceedings** are put by the latest authorities in this category. Such reports must be fair and substantially correct in fact, to begin with, and also must not be published from motives of personal ill-will; and this although the matter reported was "absolutely privileged" as to the original utterance of it.[7]

The conditions of immunity may be thus summed up: —

The occasions must be privileged; and if the defendant establishes this, he will not be liable unless the plaintiff can prove that the communication was not honestly made for the purpose of discharging a legal, moral, or social duty, or with a view to the just protection of some private interest or of the public good by giving information appearing proper to be given, but from some improper motive and without due regard to truth.[8]

The law, it is said, presumes or implies malice in all cases of defamatory words; this presumption may be rebutted by showing that the words were uttered on a privileged occasion; but after this the plaintiff may allege and prove express or actual malice, that is, wrong motive. He need not prove malice in the first instance, because the law presumes it; when the presumption is removed, the field is still open to proof.[9]

The occasions giving rise to privileged communications

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5. Goffin v. Donnelly, 6 Q. B. D. 307; Burdick on Torts, 365.
6. Burdick on Torts, 368.
7. Id., 372.
8. Good faith is *prima facie* presumed. Id., 368.
9. Id.

may be in matters of legal or social duty, as where a confidential report is made to an official superior, or in the common case of giving a character to a servant; or they may be in the way of self-defence, or the defence of an interest common to those between whom the words or writing pass; or they may be addressed to persons in public authority with a view to the exercise of their authority for the public good; they may also be matter published in the ordinary sense of the word for purposes of general information.[1]

As to occasions of private duty; the result of the authorities appears to be that **any state of facts making it right in the interests of society for one person to communicate to another what he believes or has heard regarding any persons's conduct or character will constitute a privileged occasion.**[2]

Answers to confidential inquiries, or to any inquiries made in the course of affairs for a reasonable purpose, are clearly privileged. So are communications made by a person to one to whom it is his especial duty to give information by virtue of a standing relation between them, as by a solicitor to his client about the soundness of a security, by a father to his daughter of full age about the character and standing of a suitor, and the like. Statements made without request and apart from any special relation of confidence may or may not be privileged according to the circumstances; but it cannot be prudently assumed that they will be.

Examples of privileged communications in self-protection, or the protection of a common interest, are a warning given by a master to his servants not to associate with a former fellow-servant whom he has discharged on the ground of dishonesty; a letter from a creditor of a firm in liquidation to another of the creditors, conveying information and warning as to the conduct of a member of the debtor firm in its affairs. The holder of a public office, when an attack is publicly made on his official conduct, may defend himself with the like publicity.

Communications addressed in good faith to persons in a

1. Id., 370.

2. Id., 369.

public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime, or the security of public morals, are in like manner privileged, provided the subject-matter is at least reasonably believed to be within the competence of the person addressed.[3]

Fair reports (as distinguished from comment) are a distinct class of publications enjoying the protection of "qualified privilege" to the extent to be mentioned. The fact that imputations have been made on a privileged occasion will, of course, not exempt from liability a person who repeats them on an occasion not privileged. Even if the original statement be made with circumstances of publicity, and be of the kind known as "absolutely privileged," it cannot be stated as a general rule that republication is justifiable. Certain specific immunities have been ordained by modern decisions and statutes. They rest on particular grounds, and are not to be extended. Matter not coming under any of them must stand on its own merits, if it can, as a fair comment on a subject of public interest.[4]

Fair reports of parliamentary and public judicial proceedings are treated as privileged communications.[5] In the case of judicial proceedings it is immaterial whether they are preliminary or final, and, according to the prevailing modern opinion, whether contested or *ex parte,* and also whether the court actually has jurisdiction or not, provided that it is acting in an apparently regular manner. The report need not be a report of the whole proceedings. The rule does not extend to justify the reproduction of matter in itself obscene, or otherwise unfit for general publication, or of proceedings of which the publication is forbidden by the court in which they took place.

An ordinary newspaper report furnished by a regular reporter is all but conclusively presumed, if in fact fair and substantially correct, to have been published in good faith; but an outsider who sends to a public print even a fair report of judicial proceedings containing personal imputa-

3. Harrison v. Bush, 5 E. & B. 344.

4. Burdick on Torts, 372.

5. See stat. 3 & 4 Vict., c. 9.

tions invites the question whether he sent it honestly for purposes of information, or from a motive of personal hostility; if the latter is found to be the fact, he is liable to an action.[6]

In the case of privileged communications of a confidential kind, the failure to use ordinary means of insuring privacy — as if the matter is sent on a post-card instead of in a sealed letter, or telegraphed without evident necssity — **will destroy the privilege**; either as evidence of malice, or because it constitutes a publication to persons in respect of whom there was not any privilege at all. The latter view seems on principle the better one.[7]

Where the existence of a privileged occasion is established, the plaintiff must give affirmative proof of malice, that is, a dishonest personal ill-will, in order to succeed.[8] **It is not for the defendant to prove that his belief was founded on reasonable grounds.** To constitute malice there must be something more than the absence of reasonable ground for belief in the matter communicated. That may be evidence of reckless disregard of truth, but is not always even such evidence. A man may be honest and yet unreasonably credulous; or it may be proper for him to communicate reports or suspicions which he himself does not believe. In either case he is within the protection of the rule.

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6. "Professional publishers of news are not exempt, as a privileged class, from the consequences of damage done by false news. Their communications are not privileged merely because made in public journals." Burdick on Torts (3d Ed.), 374. Consult the local statutes for modifications of this rule.

7. Williamson v. Freer, L. R. 9 C. P. 393.

8. As to the meaning of malice, see Burdick on Torts (3d Ed.), 86.

CHAPTER VIII.

WRONGS OF FRAUD AND MALICE.

1. *Deceit.*

The wrong called Deceit consists in leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood. It is a cause of action by the common law (the action being an action on the case founded on the ancient writ of deceit), and it has likewise been dealt with by courts of equity under the general jurisdiction of the Chancery in matters of fraud. The principles worked out in the two jurisdictions are believed to be identical, though there may be a theoretical difference as to the character of the remedy, which in the Court of Chancery did not purport to be damages but restitution.

To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur: —

(a) It is **untrue in fact.**

(b) The person making the statement, or the person responsible for it, either **knows it to be untrue, or is culpably ignorant** (that is, reckless or careless) whether it be true or not.

(c) It is made to **the intent that the plaintiff shall act upon it,** or in a manner apparently fitted to induce him to act upon it.

(d) **The plaintiff does act in reliance on the statement** in the manner contemplated or manifestly probable, and thereby suffer damage.[1]

There is no cause of action without actual both fraud and actual damage, or the damage is the gist of the action.[2]

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1. Burdick on Torts (3d Ed.), 418, 419, citing Sir Frederick Pollock's draft of a civil wrongs bill for India, sec. 40; Taylor v. Com. Bank, 174 N. Y. 181, 185.

2. Derry v. Peek, 14 App. Cas. 374; Smith v. Chadwick, 9 App. Cas. 196, per Lord Blackburn.

And according to the general principles of civil liability, **the damage must be the natural and probable consequence of the plaintiff's action** on the faith of the defendant's statement.

(e) **The statement must be in writing and signed, in one class of cases, namely, where it amounts to a guaranty;**[3] **but this requirement is statutory,** and did not apply to the Court of Chancery.

Of these heads in order.

(a) **A statement can be untrue in fact only if it purports to state matter of fact. A promise is distinct from a statement of fact,** and breach of contract, whether from want of power or of will to perform one's promise, is a different thing from deceit.[4] **Again, a mere statement of opinion** or inference, the facts on which it purports to be founded being notorious or equally known to both parties, is different from a statement importing that certain matters of fact are within the particular knowledge of the speaker.[5] In particular cases, however, it may be hard to draw the line between a mere expression and an assertion of specific fact. **And a man's intention** or purpose at a given time is in itself a matter of fact, and capable (though the proof be seldom easy) of being found as a fact. The vendor of goods can rescind the contract on the ground of fraud if he discovers within due time that the buyer intended not to pay the price.

When a prospectus is issued to shareholders in a company or the like to invite subscriptions to a loan, a statement of the purposes for which the money is wanted is a material statement of fact, and if untrue may be ground for an action of deceit.[6]

A representation concerning a man's private rights though it may involve matters of law, is as a whole deemed to be a statement of fact. A statement about the existence or actual text of a public Act of Parliament, or a reported

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3. See statute of frauds, *ante*, Contracts.

4. See Burdick on Torts, 419, 427.

5. Id., 421.

6. Edginton v. Fitzmaurice, 29 Ch. Div. 459.

decision, would seem to be a statement of fact. **With regard to statements of matters of general law** made only by implication, or statements of pure propositions of the law, the rule may perhaps be this, that in dealings between parties who have equal means of ascertaining the law, the one will not be presumed to rely upon a statement of matter of law made by the other.[7]

(b) **As to the knowledge and belief of the person making the statement.**

He may believe it to true. In that case he incurs no liability, nor is he bound to show that his belief was founded on such grounds as would produce the same belief in a prudent and competent man, except so far as the absence of reasonable cause may tend to the interference that there was not any real belief.

If, having honestly made a representation, a man discovers that it is not true before the other party has acted upon it, the representation must be taken to be continuously made until it is acted upon, so that from the moment the party making it discovers that it is false, and having the means of communicating the truth to the other party omits to do so, he is, in point of law, making a false representation with knowledge of its untruth.[8]

The same rule holds if the representation was true when first made, but ceases to be true by reason of some event within the knowledge of the party making it, and not within the knowledge of the party to whom it is made.[9]

On the other hand if a man states as fact what he does not believe to be fact, he speaks at his peril; and this whether he knows the contrary to be true or has no knowledge of the matter at all, for the pretence of having certain information which he has not is itself a deceit.[1]

With regard to transactions in which a more or less stringent duty of giving full and correct information (not merely of abstaining from falsehood or concealment equiv-

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7. Burdick on Torts (3d Ed.), 425.

8. Reynell v. Sprye, 1 D. M. G. 660, 709, per Lord Cranworth; Redgrade v. Hurd, 20 Ch. Div. 12, 13.

9. See *supra*, note.

1. Evans v. Edmonds, 13 C. B. 777, 786, per Maule, J.

alent to falsehood) is imposed on one of the parties, it may be doubted whether an obligation of this kind annexed by law to particular classes of contracts can ever be treated as independent of contract. If a misrepresentation by a vendor of real property, for example, is willfully or recklessly false, it comes within the general description of deceit. But there are errors of mere inadvertence which constantly suffice to avoid contracts of these kinds, and in such cases I do not think an action for deceit (or the analogous suit in equity) is known to have been maintained.[2] As regards these kinds of contracts, therefore — but, it is submitted, these only — the right of action for misrepresentation as a wrong is not co-extensive with the right of rescission. In some cases compensation may be recovered as an exclusive alternative remedy, but on different grounds, and subject to the special character and terms of the contract.

The qualification of the rule that the defendant must be shown not to have believed the truth of his assertion (if it really be a qualification) is that **a person cannot excuse himself for misrepresenting material facts which have been specially within his own knowledge,** and of which he is the proper person to give information, by alleging that at the moment he forgot the true state of things. It is a trustee's business to know whether or not he has had notice of a prior incumbrance, a lessor's business to know whether or not he has already granted a lease.

(c) **It is not a necessary condition of liability that the misrepresentation complained of should have been made directly to the plaintiff, or that the defendant should have intended or desired any harm to come to him.** It is enough that the representation was intended for him to act upon, and that he has acted in the manner contemplated, and suffered damage which was a natural and probable consequence.[3]

A statement circulated or published in order to be acted on by a certain class of persons, or at the pleasure of any

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2. See Derry v. Peek, 14 App. Cas. 337.

3. Langridge v. Levy, 2 M. & W. 519, affirmed in Ex. Ch. 4 M. & W. 338.

one to whose hands it may come, is deemed to be made to that person who acts upon it, though he may be wholly unknown to the issuer of the statement.[4]

(d) **As to the plaintiff's action on the faith of the defendant's representation.**

A. by words or acts represents to B. that a certain state of things exists, in order to induce B. to act in a certain way. The simplest case is where B., relying wholly on A.'s statement, and having no other source of information, acts in the manner contemplated. This needs no further comment. The case of B. disbelieving and rejecting A.'s assertion is equally simple.

Another case is that A.'s representation is never communicated to B. Here, though A. may have intended to deceive B., it is plain that he has not deceived him; and an unsuccessful attempt to deceive, however unrighteous it may be, does not cause damage, and is not an actionable wrong.

Another case is where the plaintiff has at hand the means of testing the defendant's statement, indicated by the defendant himself, or otherwise within the plaintiff's power, and either does not use them or uses them in a partial and imperfect manner. **One who chooses, however, to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them.** He must show that his representation was not in fact relied upon.[5]

And the same principle applies as long as the party substantially puts his trust in the representation made to him, even if he does use some observation of his own.

A cursory view of a house, asserted by the vendor to be in good repair, does not preclude the purchaser from complaining of substantial defects in repair which he afterwards discovers.[6]

In short, nothing will excuse a culpable misrepresentation short of proof that is was not relied on, either because the other party knew the truth, or because he relied wholly on

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4. Polhill v. Walter, 3 B. & Ad. 114.

5. Dobell v. Stevens, 3 B. & C. 623.

6. Dyer v. Hargrave, 10 Ves. 510.

his own investigation, or because the alleged fact did not influence his action at all. And the burden of this proof is on the person who has been proved guilty of material misrepresentation.[7]

Difficulties may arise on the construction of the statement alleged to be deceitful. Of course a man is responsible for the obvious meaning of his assertions; but where the meaning is obscure, it is for the party complaining to show that he relied upon the words in a sense in which they were false and misleading, and of which they were fairly capable.[8]

(e) **A false representation may at the same time be a promise** such as to amount to, or to be in the nature of, a guaranty. Now, by the Statute of Frauds, a guaranty cannot be sued on as a promise unless it is in writing and signed by the party to be charged or his agent.[9] If an oral guaranty could be sued on in tort, by treating it as a fraudulent affirmation instead of a promise, the statute might be largely evaded. **By Lord Tenterden's Act,**[1] the following provision was made: —

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."[2]

False representations made by an agent on account of his principal. Bearing in mind that reckless ignorance is equivalent to guilty knowledge, we may state the alternatives to be considered as follows: —

The principal knows the representation to be false and authorizes the making of it. Here, the principal is clearly liable; the agent is or is not liable according as he does not or does himself believe the representation to be true.

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7. 20 Ch. Div. 21, per Jessel, M. R.

8. Smith v. Chadwick, 9 App. Cas. 187.

9. See *ante*, Contracts, Statute of Frauds.

1. 9 Geo. 4, c. 14, s. 6.

2. Similar statutes have been enacted in some of the states. Burdick on Torts (3d Ed.), 424 and note.

The principal knows the contrary of the representation to be true, and it is made by the agent in the general course of his employment but without specific authority.

Here, if the agent does not believe his representation to be true, he commits a fraud in the course of his employment and for the principal's purposes, and the principal is liable.[3]

If the agent does believe the representation to be true, there is a difficulty; for the agent has not done any wrong and the principal has not authorized any. Yet the other party's damage is the same. That he may rescind the contract, if he has been misled into a contract, may now be taken as settled law.[4] But what if there was not any contract, or rescission has become impossible? Has he a distinct ground of action, and if so how? We think that an action lies against the principal; whether properly to be described, under common-law forms of pleading, as an action for deceit, or as an analogous but special action on the case, there is no occasion to consider.

On the other hand an honest and prudent agent may say, "To the best of my own belief such and such is the case," adding in express terms or by other clear indication — "but I have no information from my principal." Here there is no ground for complaint, the other party being fairly put on inquiry.

If the principal does not expressly authorize the representation, and does not know the contrary to be true, but the agent does, the representation being in a matter within the general scope of his authority, the principal is liable, as he would be for any other wrongful act of an agent about his business. This liability equally holds when the principal is a corporation.[5]

The hardest case that can be put for the principal, and by no means an impossible one, is that the principal authorizes a specific statement which he believes to be true, and which at the time of giving the authority is true; before the agent has executed his authority the facts are materially changed to the knowledge of the agent, but unknown to the

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3. 6 M. & W. 373, per Parke, B.
4. See Pollock on Contracts, 552.
5. Barwick v. Bank, Ex. Ch. L. R. 2 Ex. 259.

principal; the agent conceals this from the principal, and makes the statement as originally authorized. The necessary and sufficient condition of the master's responsibility is that the act or default of the servant or agent belonged to the class of acts which he was put in the master's place to do, and was committed for the master's purposes. And "no sensible distinction can be drawn between the case of fraud and the case of any other wrong."[6]

2. *Slander of Title.*

The wrong called Slander of Title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by the defendant's falsehood to act in a manner causing damage to the plaintiff. An action for this cause is "an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." Also, the wrong is a malicious one in the only proper sense of the word, that is, absence of good faith is an essential condition of liability; **or actual malice, no less than special damage, is of the gist of the action.**[7]

A disparaging statement concerning a man's title to use an invention, design, or trade name, or his conduct in the matter of a contract, may amount to a libel or slander on him in the way of his business: in other words, the special wrong of slander of title may be included in defamation, but it is evidently better for the plaintiff to rely on the general law of defamation if he can, as thus he escapes the trouble-some burden of proving malice.

The protection of trade-marks and trade names was originally undertaken by the courts on the ground of preventing fraud.[8] But the right to a trade-mark, after being more and more assimilated to proprietary rights, has [in England] become a statutory franchise analogous to patent rights and copyright; and in the case of a trade name, although the use of a similar name cannot be complained of

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6. See Barwick v. Bank, *supra*.

7. Burdick on Torts (3d Ed.), 434-438.

8. Id., 441. Not necessary to the validity of a trade-mark that it be registered. Id., 441.

unless it is shown to have a tendency to deceive customers, yet the tendency is enough; the plaintiff is not bound to prove any fraudulent intention or even negligence against the defendant.

3. *Malicious Prosecution and Abuse of Process.*

"**In an action for malicious prosecution the plaintiff has to prove,** first, **that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made;** secondly, **that there was a want of reasonable and probable cause for the prosecution,** and lastly, **that the proceedings of which he complains were initiated in a malicious spirit,** that is, from an indirect and improper motive, and not in furtherance of justice." And the plaintiff's case fails if his proof fails at any one of these points.[9]

It has been doubted whether an action for malicious prosecution will lie against a **corporation.** It seems, on principle, that such an action will lie if the wrongful act was done by a servant of the corporation in the course of hns employment and in the company's supposed interest, and it has been so held, but there are dicta to the contrary.

"**In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.**"[1]

But there are proceedings which, though civil, are not ordinary actions, and fall within the reason of the law which allows an action to lie for the malicious prosecution of a criminal charge. That reason is that prosecution on a charge "involving either scandal to reputation, or the possible loss of liberty to the person," necessarily and manifestly imports damage. Thus, the commencement of pro-

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9. Burdick on Torts (3d Ed.), 285. Damage is also a necessary element of the cause of action. Id., 285, 293.

As to advice of counsel as evidence of probable cause, see Burdick on Torts (3d Ed.), 290 *et seq.*

1. 11 Q. B. D. 682, 690, per Bowen, L. J. The courts of this country are divided on this question. Burdick on Torts (3d Ed.), 296.

ceedings in bankruptcy against a trader, if instituted without reasonable and probable cause and with malice, is an actionable wrong. In common-law jurisdictions, where a suit can be commenced by arrest of the defendant or attachment of his property, the same rule will apply.[2]

4. *Other Malicious Wrongs.*

The modern action for malicious prosecution has taken the place of the old writ of conspiracy and the action on the case grounded thereon, out of which it seems to have developed. **Whether conspiracy is known to the law as a substantive wrong,** or in other words, whether two or more persons can ever be joint wrong-doers, and liable to an action as such, by doing in execution of a previous agreement something it would not have been unlawful for them to do without such agreement, is a question of mixed history and speculation not wholly free from doubt. It seems to be **the better opinion that the conspiracy or "confederation" is not in any case the gist of the action, but is only matter of inducement or evidence.**[3] Either the wrongful acts by which the plaintiff has suffered were such as one person could not commit alone, say a riot, or they were wrongful because malicious, and the malice is proved by showing that they were done in execution of a concerted design. In the singular case of Gregory v. Duke of Brunswick,[4] the action was in effect for hissing the plaintiff off the stage of a theatre in pursuance of a malicious conspiracy between the defendants. The court were of opinion that in point of law the conspiracy was material only as evidence of malice, but that in point of fact there was no other such evidence, and therefore the jury were rightly directed that without proof of it the plaintiff's case must fail.

Soon after this case was dealt with by the Court of Com-

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2. Quartz Hill Gold Mining Co. v. Eyre, 11 Q. B. Div. 674; Cooley on Torts (Students' Ed.), 186.

3. In other words that damage to plaintiff is the gist of the action. See Burdick on Torts (3d Ed.), 325. See, however, the reasoning of the same author, *contra*. Id., 326 and cases cited.

4. 6 Man. & Gr. 205, 953.

mon Pleas in England, the Supreme Court of New York[5] laid it down that conspiracy is not in itself a cause of action.

There may be **other malicious injuries** not capable of more specific definition "where a violent or malicous act is done to a man's occupation, profession, or way of getting a livelihood;" as where the plaintiff is owner of a decoy for catching wild-fowl, and the defendant, without entering on the plaintiff's land, wilfully fires off guns near to the decoy, and frightens wild-fowl away from it.[6]

Generally speaking, every wilful interference with the exercise of a franchise is actionable without regard to the defendant's action being done in good faith, by reason of a mistaken notion of duty or claim of right, or being consciously wrongful.[7]

The wrong of maintenance, or aiding a party in litigation, without either interest in the suit, or lawful cause of kindred, affection, or charity for aiding him, is akin to malicous prosecution and other abuses of legal process; but the ground of it is not so much an independent wrong as particular damage resulting from "a wrong founded upon a prohibition by statute" — a series of early statutes said to be in affirmation of the common law — "which makes it a criminal act and a misdemeanor." Hence it seems that a corporation cannot be guilty of maintenance. Actions for maintenance are in modern times rare though possible; and the recent decision of the Court of Appeals that mere charity, with or without reasonable ground, is an excuse for maintaining the suit of a stranger, does not tend to encourage them.[8]

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5. Hutchins v. Hutchins (1845), 7 Hill, 104; and Bigelow's Lead. Cases, 207. See the cases *pro* and *contra* cited in notes, Burdick on Torts (3d Ed.), 325-327.

6. Carrington v. Taylor, 11 East, 571.

7. Ashby v. White, per Holt, C. J., at p. 13, special report first printed in 1837. See note to Pollock on Torts, Webb's Edition, 411.

8. Harris v. Brisco, 17 Q. B. Div. 504; Burdick on Torts (3d Ed.), 30, 302.

CHAPTER IX.

WRONGS TO POSSESSION AND PROPERTY.

1. *Duties Regarding Property Generally.*

Every kind of intermeddling with anything which is the subject of property is a wrong, unless it is either authorized by some person entitled to deal with the thing in that particular way, **or justified** by authority of law, **or** (in some cases but by no means generally) **excusable** on the ground that it is done under a reasonable though mistaken supposition of lawful title or authority. Broadly speaking, **we touch the property of others at our peril,** and honest mistake in acting for our own interest,[1] or even an honest intention to act for the benefit of the true owner,[2] will avail us nothing if we transgress.

The forms of action at the common law brought not Ownership but Possession to the front.—An owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes the " true owner " of goods is the person, and only the person, entitled to immediate possession. Regularly the common law protects ownership only through possessory rights and remedies.

It must be known who is in legal possession of any given subject of property, and who is entitled to possess it, before we can tell what wrongs are capable of being committed, and against whom, by the person having physical control over it, or by others. Legal possession does not necessarily coincide either with actual physical control or the present power thereof (the " detention " of Continental terminology), or with the right to possess (constantly called property in our books); and it need not have a rightful origin. The separation of detention, possession in the strict sense, and the right to possess, is both possible and frequent.

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1. Hollins v. Fowler, L. R. 7 H. L. 757.

2. Kirk v. Gregory, 1 Ex. D. 55.

Trespass is the wrongful disturbance of another person's possession of land or goods.[3] Therefore it cannot be committed by a person who is himself in possession, though in certain exceptional cases a dispunishable or even a rightful possessor of goods may by his own act, during a continuous physical control, make himself a mere trespasser. **But a possessor may do wrong in other ways.** He may commit waste as to the land he holds, or he may become liable to an action of ejectment by holding over after his title or interest is determined. As to goods, he may detain them without right after it has become his duty to return them, or he may convert them to his own use.

Thus we have two kinds of duty, namely, to refrain from meddling with what is lawfully possessed by another, and to refrain from abusing possession which we have lawfully gotten under a limited title; and the breach of these produces distinct kinds of wrong, having their appropriate remedies. On the one hand the remedies of an actual possessor were by the common law freely accorded to persons who had only the right to possess; on the other hand the person wronged was constantly allowed at his option to proceed against a mere trespasser as if the trespasser had only abused a lawful or at any rate excusable possession.

In the later history of common law pleading **trespass and conversion became largely, though not wholly, interchangeable. Detinue,** the order form of action for the recovery of chattels, was not abolished, but it was generally preferable to treat the detention as a conversion and sue in trover, so that **trover practically superseded detinue.**[4]

2. *Trespass.*

Trespass may be committed by various kinds of acts, of which the most obvious are **entry on another's land** (trespass *quare clausum fregit*),[5] and **taking another's goods** (trespass *de bonis asportatis*).[6]

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3. Burdick on Torts (3d Ed.), 387.
4. See Pleading (detinue).
5. Wherefore he broke and entered.
6. For goods taken and carried away.

Neither the use of force, nor the breaking of an enclosure or transgression of a visible boundary, nor even an unlawful intention, is necessary to constitute an actionable trespass. It is likewise immaterial, in strictness of law, whether there be any actual damage or not. "Every invasion of private property, be it ever so minute, is a trespass." [7]

It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in a baloon, or to cause a material object, as shot fired from a gun, to pass over it; but the better opinion is that such acts are trespasses.

Clearly there can be a wrongful entry on land below the surface, as by mining. [8]

Trespass by a man's cattle is dealt with exactly like trespass by himself.

Trespass to goods may be committed by taking possession of them, or by any other act "in itself immediately injurious" to the goods in respect of the possessor's interest, as by killing, beating, or chasing animals, or defacing a work of art. Where the possession is changed the trespass is an **asportation,** and may amount to the offence of theft. Other trespasses to goods may be criminal offences under the head of malicious injury to property.

3. *Injuries to Reversion.* [9]

A person in possession of property may do wrong by refusing to deliver possession to a person entitled, or by otherwise assuming to deal with the property as owner or adversely to the true owner, or by dealing with it under color of his real possessory title but in excess of his rights, or, where the nature of the object admits of it, by acts amounting to destruction or total change of character.

The law started from entirely distinct conceptions of the mere detaining of property from the person entitled, and the spoiling or altering it to the prejudice of one in revision or

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7. Entick v. Carrington, 19 St. Tr. 1066. See the subject of trespass treated under the head Pleading, *ante*, this volume.

8. As to trespass above the land by aeroplanes, see Burdick on Torts (3d Ed.), 388, note.

9. See ante, Pleading, Action on the Case.

remainder, or a general owner. For the former case the common law provided its most ancient remedies—**the writ of right** (and later the various assizes and the writ of entry) for land, and the parallel **writ of detinue** (parallel as being merely a variation of the writ of debt, which was precisely similar in form to the writ of right) for goods; to this must be added, in special, but once frequent and important cases, replevin. For the latter the writ of waste (as extended by the Statutes of Marlbridge and Gloucester) was available as to land; later this was supplanted by an action on the case "in the nature of waste," and in modern times the powers and remedies of courts of equity have been found still more effectual.

Owners of chattels were helped by an **action on the case,** which became a distnict species under the name of **trover,** which alleged that the defendant found the plaintiff's goods and converted them to his own use. The original notion of *conversion* in personal chattels answers closely to that of *waste* in tenements; but it was soon extended so as to cover the whole ground of detinue, and largely overlap trespass; a mere trespasser, whose acts would have amounted to conversion if done by a lawful possessor, not being allowed to take exception to the true owner "waiving the trespass," and professing to assume in the defendant's favor that his possession had a lawful origin.

4. *Waste.*

Waste is any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance. "In order to prove waste you must prove an injury to the inheritance," either "in the sense of value" or "in the sense of destroying identity." And in the United States, especially the Western States, many acts are held to be only in a natural and reasonable way of using and improving the land—clearing wild woods, for example—which in England, or even in the Eastern States, would be manifest waste.[1]

1. See vol. 1 (Blackstone), title, Waste.

As to permissive waste, *i. e.*, suffering the tenement to lose its value or go to ruin for want of necessary repair, a tenant for life or years is liable therefor if an express duty to repair is imposed upon him by the instrument creating his estate; otherwise it is doubtful. It seems that it can in no case be waste to use a tenement in an apparently reasonable and proper manner, "having regard to its character and to the purposes for which it was intended to be used," whatever the actual consequences of such user may be.

In modern practice, questions of waste arise either between a tenant for life and those in remainder, or between landlord and tenant. In the former case, the unauthorized cutting of timber is the most usual ground of complaint; in the latter, the forms of misuse or neglect are as various as the uses, agricultural, commercial, or manufacturing, for which the tenement may be let and occupied.

A tenant for life whose estate is expressed to be without impeachment of waste may freely take timber and minerals for use, but, unless with further specific authority, he must not remove timber planted for ornament (save so far as the cutting of part is required for the preservation of the rest), open a mine in a garden or pleasure-ground, or do like acts destructive to the individual character and amenity of the dwelling-place. The commission of such waste may be restrained by **injunction,** without regard to pecuniary damage to the inheritance; but, when it is once committed, the normal measure of damages can only be the actual loss of value.

As between landlord and tenant the real matter in dispute, in a case of alleged waste, is commonly the extent of the tenant's obligation, under his express or implied covenants, to keep the property demised in safe condition or repair.

5. *Conversion.*

Conversion, according to recent authority, may be described as the wrong done by "an unauthorized act which deprives another of his property permanently or for an indefinite time." Such an act may or may not include a

trespass; whether it does or not is immaterial as regards the right of the plaintiff in a civil action, for he may "waive the trespass."

The "property" of which the plaintiff is deprived must be something which he has the immediate right to possess. But an owner not entitled to immediate possession might have a special action on the case, not being trover, for any permanent injury to his interest, though the wrongful act might also be a trespass, conversion, or breach of contract as against the immediate possessor.

The grievance of conversion is the unauthorized assumption of the powers of the true owner.[2] Actually dealing with another's goods as owner for however short a time and however limited a purpose is therefore conversion; so is an act which in fact enables a third person to deal with them as owner, and which would make such dealing lawful only if done by the person really entitled to possess the goods. It makes no difference that such acts were done under a mistaken but honest and even reasonable supposition of being lawfully entitled, or even with the intention of benefiting the true owner; nor is a servant excused for assuming the dominion of goods on his master's behalf, though he "acted under an unavoidable ignorance and for his master's benefit."

A refusal to deliver possession to the true owner on demand is commonly said to be evidence of a conversion, but evidence only.[3] "If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or for a third person, it is a conversion."

But the refusal may be a qualified and provisional one: the possessor may say, "I am willing to do right, but that I may be sure I am doing right, give me reasonable proof that you are the true owner;" and such a possessor, even if over-cautious in the amount of satisfaction he requires, can

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2. This may be done in four ways: (1) a wrongful taking under claim of ownership or a claim inconsistent with plaintiff's ownership; (2) an exclusion of the plaintiff from his rightful exercise of dominion, although the defendant's taking was lawful; (3) a wrongful use of the property; (4) its wrongful detention. Burdick on Torts (3d Ed.), 401 *et seq.*

3. Burdick on Torts (3d Ed.), 413.

hardly be said to repudiate the true owner's claim.[4] "**An unqualified refusal is almost always conclusive evidence of a conversion**; but if there be a qualification annexed to it, the question then is whether it be a reasonable one."[5]

By a conversion the true owner is, in contemplation of law, totally deprived of his goods; therefore, except in a few very special cases, **the measure of damages in an action of trover was the full value of the goods, and by a satisfied judgment for the plaintiff, the property in the goods, if they still existed in specie, was transferred to the defendant.**[6]

The mere assertion of a pretended right to deal with goods or threatening to prevent the owner from dealing with them is not conversion, though it may perhaps be a cause of action, if special damage can be shown.

An attempted sale of goods which does not affect the property, the seller having no title and the sale not being in market overt,[7] nor yet the possession, there being no delivery, is not a conversion. But if a wrongful sale is followed up by delivery, both the seller and the buyer are guilty of a conversion.

A merely ministerial dealing with goods, at the request of an apparent owner having the actual control of them, appears not to be conversion.

Acts of servants. There appears to be nothing in the authorities to prevent it from being excusable to deal with goods merely as the servant or agent of an apparent owner in actual possession, or under a contract with such owner, according to the apparent owner's direction; neither the act done nor the contract (if any) purporting to involve a transfer of the supposed property in the goods, and the ostensible owner's direction being one which he could lawfully give if he were really entitled to his apparent interest, and being obeyed in the honest belief that he is so entitled.

A bailee is prima facie estopped, as between himself and the bailor, from disputing the bailor's title. Hence, as he

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4. Burdick on Torts (3d Ed.), 413.
5. Id.
6. It is not the judgment alone, but judgment and satisfaction that pass the title. Cooley on Torts (Students' Ed.), 437.
7. There are no markets overt in this country.

cannot be liable to two adverse claimants at once, he is also justified in redelivering to the bailor in pursuance of his employment, so long as he has not notice (or rather is not under the effective pressure) of any paramount claim; it is only when he is in danger of such a claim that he is not bound to redeliver to the bailor.

Where a bailee has an interest of his own in the goods (as in the common cases of hiring and pledge), and under color of that interest deals with the goods in excess of his right, such dealing will not be the wrong of conversion unless the possessor's dealing is "wholly inconsistent with the contract under which he had the limited interest;" as if a hirer, for example, destroys or sells the goods.

The case of a common-law lien, which gives no power of disposal at all, is different; there the holder's only right is to keep possession until his claim is satisfied. If he parts with possession, his right is gone and his attempted disposal merely wrongful, and therefore he is liable for the full value.

A mortgagor having the possession and use of goods under covenants entitling him thereto for a certain time, determinable, by default after notice, is virtually a bailee for a term, and, like bailees in general, may be guilty of conversion by an absolute disposal of the goods; and so may assignees claiming through him with no better title than his own.[8]

6. *Injuries between Tenants in Common.*

As between tenants in common of either land or chattels there cannot be trespass unless the act amounts to an actual ouster, *i. e.*, dispossession. Short of that, "trespass will not lie by the one against the other, so far as the land is concerned."[9]

In the same way acts of legitimate use of the common property cannot become a conversion through subsequent

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8. As to what amounts to a conversion, see, generally, Burdick on Torts (3d Ed.), 405 *et seq.*; Cooley on Torts (Students' Ed.), 423 *et seq.*; Burdick's Cases on Torts, ch. 12.

9. Jacobs v. Seward, L. R. 5 H. L. 464.

misappropriation, though the form in which the property exists may be wholly converted, in a wider sense, into other forms. There is no wrong to the co-tenant's right of property until there is an act inconsistent with the enjoyment of the property by both. For every tenant or owner in common is equally entitled to the occupation and use of the tenement or property; he can therefore become a trespasser only by the manifest assumption of an exclusive and hostile possession. Acts which involve the destruction of the property held in common, such as digging up and carrying away the soil, are deemed to include ouster.[1]

7. *Extended Protection of Possession.*

Trespass and other violations of possessory rights can be committed not only against the person who is lawfully in possession, but against any person who has legal possession whether rightful in its origin or not, so long as the intruder cannot justify his act under a better title. A mere stranger cannot be heard to say that one whose possession he has violated was not entitled to possess. Unless and until a superior title or justification is shown, existing legal possession is not only presumptive but conclusive evidence of the right to possess. The practical result is that **an outstanding claim of a third party** (*jus tertii*, as it is called) **cannot be set up to excuse either trespass or conversion:** "against a wrongdoer, possession is a title."[2] As regards real property, a possession commencing by trespass can be defended against a stranger not only by the first wrongful occupier, but by those claiming through him. The rule is in aid of *de facto* possession only. It will not help a claimant who has been in possession, but has been dispossessed in a lawful manner and has not any right to possess.

Again, as *de facto* possession is thus protected, so **de jure possession**—if by that term we may designate an immediate right to possess when separated from actual legal possession **—was even under the old system of pleading invested with**

1. See, generally, Burdick on Torts (3d Ed.), 415.

2. Burdick on Torts (3d Ed.), 400.

the benefit of strictly possessory remedies: that is, an owner who had parted with possession, but was entitled to resume it at will, could sue in trespass for a disturbance by a stranger. Such is the case of a landlord where the tenancy is at will, or of a bailor where the bailment is revocable at will, or on a condition that can be satisfied at will. In this way the same act may be a trespass both against the actual possessor and against the person entitled to resume possession.[3]

Derivative possession is equally protected, through whatever number of removes it may have to be traced from the owner in possession, who (by modern lawyers at any rate) is assumed as the normal root of title.

One who receives possession from a trespasser, even with full knowledge, does not himself become a trespasser against the true owner, as he has not violated an existing lawful possession.[4] The old law of real property was even more favorable to persons claiming through a disseisor; but at the present day the old forms of action are almost everywhere abolished;[5] and it is quite certain that the possessor under a wrongful title, even if he is himself acting in good faith, is by the common law liable in some form to the true owner, and in the case of goods must submit to recapture if the owner can and will retake them.

8. *Wrongs to Easements, etc.*

Easements and other incorporeal rights in property, "rather a fringe to property than property itself," as they have been called, are not capable in an exact sense of being possessed. **The enjoyment which may in time ripen into an easement is not possession**, and gives no possessory right before the due time is fulfilled: "a man who has used a way ten years without title cannot sue even a stranger for stopping it." The only possession that can come in question is

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3. See Barker v. Furlong, 2 Ch. 172; 48 Edw. 3, pl. 8; Bro. Abr., Trespass, pl. 131.

4. Wilson v. Barber, 4 B. & Ad. 614.

5. They are retained in a number of states in this country. See *ante*, Pleading.

the possession of the dominant tenement itself, the texture of legal rights and powers to which the " fringe " is incident. **Nevertheless disturbance of easements and the like, as completely existing rights of use and enjoyment, is a wrong in the nature of trespass, and remediable by action** without any allegation or proof of specific damage; the action was **on the case** under the old forms of pleading.[6]

Franchises and incorporeal rights[7] of the like nature, as patent and copyrights, present something more akin to possession, for their essence is exclusiveness. But the same remark applies; in almost every disputed case the question is of defining the right itself, or the conditions of the right; and *de facto* enjoyment does not even provisionally create any substantive right, but is material only as an incident in the proof of title.[8]

9. *Grounds of Justification and Excuse.*

Acts of interference with land or goods may be justified by the consent of the occupier or owner; or they may be justified or excused **by the authority of the law.** That **consent** which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful, is called a **license.** There may be licenses not affecting the use of property at all, and on the other hand a license may be so connected with the transfer of property as to be in fact inseparable from it.

" **A dispensation or license properly passeth no interest,** nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which without license had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts if hunting and

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6. Cooley on Torts (Students' Ed.), 371.

7. See id., ch. 12.

8. See Thomas v. Sorrell, Vaughan, 351, per Vaughan, C. J.

cutting down the tree, but as to the carrying away of the deer killed and tree cut down they are grants."[9]

Generally speaking, a **license** is a mere voluntary suspension of the licensor's right to treat certain acts as wrongful, and **is revoked by signifying to the licensee that it is no longer his will to allow those acts.** The revocation of a license is in itself **no less effectual though it may be a breach of contract.** If the owner of land or a building admits people thereto on payment, as spectators of an entertainment or the like, it may be a breach of contract to require a person who has duly paid his money and entered to go out, but a person so required has no title to stay, and if he persists in staying he is a trespasser. His only right is to sue on the contract: when, indeed, he may get an injunction, and so be indirectly restored to the enjoyment of the license.[1] **But if a license is part of a transaction whereby a lawful interest in some property, besides that which is the immediate subject of the license, is conferred on the licensee, and the license is necessary to his enjoyment of that interest, the license is said to be "coupled with an interest," and cannot be revoked** until its purpose is fulfilled: nay more, where the grant obviously cannot be enjoyed without an incidental license, the law will annex the necessary license to the grant.[2]

The grant or revocation of a license may be either by express words or by any act sufficiently signifying the licensor's will; if a man has leave and license to pass through a certain gate, the license is as effectually revoked by locking the gate as by a formal notice.

A license, being only a personal right—or rather a waiver of the licensor's rights—is not assignable, and confers no right against any third person. If a so-called license does operate to confer an exclusive right capable of being protected against a stranger, it must be that there is more than a license, namely, the grant of an interest or easement.

Justification by authority of the law is of two kinds:—

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9. See Thomas v. Sorrell, Vaughan, 351, per Vaughan, C. J.

1. Wood v. Leadbitter, 13 M. & W. 838; Cooley on Torts (Students' Ed.), 325, 326.

2. See next note, *supra*.

1. **In favor of a true owner against a wrongful possessor**; under this head come **re-entry** on land and **retaking of goods.**

2. **In favor of a paramount right conferred by law against the rightful possessor**; which may be in the execution of **legal process**, in the assertion or **defence** of private right, or in some cases by reason of **necessity.**

A person entitled to the possession of lands or tenements does no wrong to the person wrongfully in possession by entering upon him; and it is said that by the old common law he might have entered by force. **But forcible entry is an offence under the statute of 5 Ric. II. (A. D. 1381)**, which provided that "none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy [the true reading of the Parliament Roll appear to be 'lisible, aisee, and peisible,] manner." This statute is still in force here, and "has been re-enacted in the several American States, or recognized as a part of the common law. The offence is equally committed whether the person who enters by force is entitled to possession or not, but opinions have differed as to the effect of the statute in a court of civil jurisdiction." The correct view seems to be that the possession of a rightful owner gained by forcible entry is lawful as between the parties, but he shall be punished for the breach of the peace by losing it, besides making a fine to the king. If the latest decisions are correct, the dispossessed intruder might nevertheless have had a civil remedy in some form (by special action on the case, it would seem) for incidental injuries to person or goods.[3]

A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner. His condition is quite different from that of a rightful owner out of possession, who can recover legal possession by any kind of effective interruption of the intruder's actual and

3. See Wash. Crim. Law (3d Ed.), 51.

exclusive control. There must be not only occupation, but effective occupation, for the acquisition of possessory rights. And unless and until possession has been acquired, the very continuance of the state of things which constitutes the trespass is a new trespass at every moment.[4]

Recaption of goods. As regards goods which have been wrongfully taken, the taker is a trespasser all the time that his wrongful possession continues, so much so that "the removal of goods, wrongfully taken at first, from one place to another, is held to be a several trespass at each place."[5] **Accordingly the true owner may retake the goods if he can, even from an innocent third person** into whose hands they have come; and, as there is nothing in this case answering to the statutes of forcible entry, he may use whatever force is reasonably necessary for the recaption.[6] He may also enter on the first taker's land for the purpose of recapture if the taker has put the goods there, for they came there by the occupier's own wrong;[7] but he cannot enter on a third person's land unless, it is said, the original taking was felonious, or perhaps, as it has been suggested, after the goods have been claimed and the occupier of the land has refused to deliver them.

One of the most important heads of justification under a paramount right is **the execution of legal process.** The mere taking and dealing with that which the law commands to be so taken and dealt with, be it the possession of land or goods, or both possession and property of goods, is of course no wrong; and in particular if possession of a house cannot be delivered in obedience to a writ without breaking the house open, broken it must be. It is equally settled on the other hand that "the sheriff must at his peril seize the goods of the party against whom the writ issues," and not any other goods which are wrongfully supposed to be his; even unavoidable mistake is no excuse.[8]

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4. Browne v. Dawson, 12 A. & E. 624.
5. 1 Wm. Saunders, 20.
6. Blades v. Higgs, 10 C. B. N. S. 713.
7. Patrick v. Colerick, 3 M. & W. 483.
8. Glasspoole v. Young, 9 B. & C. 696.

Outer doors may not be broken in execution of process at the suit of a private person; but at the suit of the Crown, or in execution of process for contempt of a House of Parliament or of a Superior Court, they may, and must; and this, in the latter case, though the contempt consist in disobedience to an order made in a private suit.[9]

The right of distress, where it exists, justifies the taking of goods from the true owner: it seems that the distrainor does not acquire possession, the goods being "in the custody of the law." Most of the practical importance of the subject is in connection with the law of landlord and tenant, and we shall not enter here on the learning of distress for rent and other charges on land.

Distress damage feasant is the taking by an occupier of land of chattels (commonly, but not necessarily, animals) found encumbering or doing damage on the land. The right given by the law is therefore a right of self-protection against the continuance of a trespass already commenced. It must be a manifest trespass; distress damage feasant is not allowed against a party having any color of right, *e. g.*, one commoner cannot distrain upon another commoner for surcharging. "For damage feasant one may distreine in the night, otherwise it may be the beasts will be gone before he can take them." But in other respects "damage feasant is the strictest distress that is, for the thing distrained must be taken in the very act," and held only as **a pledge** for its own individual trespass, and other requirements observed.

Entry to take a distress must be peaceable and without breaking in; it is not lawful to open a window, though not fastened, and enter thereby.[1]

Finally there are cases in which **entry on land** without consent is **excused by the necessity of self-preservation, or the defence of the realm, or an act of charity** preserving the occupier from irremediable loss, or sometimes by the **public safety or convenience,** as in putting out fires,[2] or as where

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9. See this subject well considered in Wash. Cr. Law (3d Ed.), 182-184 and notes.

1. The right of distress, where not abolished, is largely regulated by statute, which consult. See Burdick on Torts (3d Ed.), 226; vol. 1 (Blackstone), Distress.

2. These subjects have already been considered, *ante*.

a highway is impassable, and passing over the land on either side is justified; but in this last-mentioned case it is perhaps rather a matter of positive common right than of excuse.[3]

Fox-hunting. At one time it was supposed that the law justified entering on land in fresh pursuit of a fox, because the destruction of noxious animals is to be encouraged; but this is not the law now.[4]

Trespass ab initio. A possessor by consent, or a licensee, may commit a wrong by abusing his power, but he is not a trespasser. If I lend you a horse to ride to York, and you ride to Carlisle, I shall not have (under the old forms of pleading) a general action of trespass, but an action on the case.[5] **But "when entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio,"** that is, the authority or justification is not only determined, but treated as if it had never existed. "The law gives authority to enter into a common inn or tavern; so to the lord to distrain; to the owner of the ground to distrain damage feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. * * * But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress; or if he who enters to see waste break the house or stays there all night; or if the commoner cuts down a tree; in these and the like cases the law adjudges that he entered for that purpose, and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*."[6]

This doctrine is applicable only when there has been some kind of active wrong-doing; not when there has been a mere refusal to do something one ought to do — as to pay for one's drink at an inn.[7]

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3. See Arnold v. Holbrook, L. R. 8 Q. B. 96; Webb's Pollock's Torts, 475, notes.

4. Paul v. Summerhayes, 4 Q. B. D. 9.

5. This act would be a conversion.

6. The Six Carpenters' Case, 8 Co. 146 a, b; s. c. 1 Smith's Lead. Cases, *216; Burdick on Torts (3d Ed.), 397.

7. Id.

10. *Remedies.*

The only peculiar remedy available for this class of wrongs is **distress damage feasant**, which, though an imperfect remedy, is so far a remedy that it suspends the right of action for the trespass. The distrainor "has an adequate satisfaction for his damage till he lose it without default in himself;" in which case he may still have his action.[8] The retaking of goods taken by trespass does not, it seems, extinguish the true owner's right of action, though it of course affects the amount of damages.

An injunction can be granted to restrain a continuing trespass, such as the laying and keeping of waterpipes under a man's ground without either his consent or justification by authority of law; and the plaintiff need not prove substantial damage to entitle himself to this form of relief.[9]

CHAPTER X.

NUISANCE.

Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property or, in some cases, in the exercise of a common right. The wrong is in some respects analogous to trespass, and the two may coincide, some kinds of nuisance being also continuing trespasses. The scope of nuisance, however, is wider. **A nuisance may be public or private.**

Public or common nuisances affect the Queen's subjects at large, or some considerable portion of them, such as the inhabitants of a town; and the person therein offending is liable to criminal prosecution. **A public nuisance does not necessarily create a civil cause of action for any person**; but it may do so under certain conditions.

A private nuisance affects only one person or a determinate number of persons, and is the ground of civil pro-

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8. Vaspor v. Edwards, 12 Mod. 660, per Holt, C. J.

9. See *ante*, Injunction.

ceedings only. Generally it affects the control, use, or enjoyment of immovable property; but this is not a necessary element.

In order to sustain an indictment for nuisance it is enough to show that the exercise of a common right of the Queen's subjects has been sensibly interfered with. It is no answer to say that the state of things causing the obstruction is in some other way a public convenience. It is also not material whether the obstruction interferes with the actual exercise of the right as it is for the time being exercised.[1]

A private action can be maintained in respect of a public nuisance by a person who suffers thereby some particular loss or damage beyond what is suffered by him in common with all other persons affected by the nuisance.[2] Interference with a common right is not of itself a cause of action for the individual citizen. Particular damage consequent on the interference is.

In the modern authorities the conception of private nuisance includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the tenure. Blackstone's phrase is "anything done to the hurt or annoyance of the land, tenements or hereditaments of another "[3]— that is, so done without any lawful ground of justification or excuse.

Kinds of nuisance, affecting — 1. Ownership. Some acts are nuisances, according to the old authorities and the course of procedure on which they were founded, which involve such direct interference with the rights of a possessors as to be also trespasses, or hardly distinguishable from trespasses. "A man shall have an assize of nuisance for building a house higher than his house, and so near his, that the rain which falleth upon that house falleth upon the plaintiff's house." And it is stated to be a nuisance if a tree growing on my land overhangs the public road, or my neighbor's land. In this class of cases nuisance means

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1. See, as to public nuisances, Wash. Cr. Law (3d Ed.), 85-88.

2. Y. B., 27 Hen. VIII, 27, pl. 10. The subject of Nuisance fully considered in Burdick on Torts (3d Ed.), ch. 14.

3. See vol. 1 (Blackstone), Nuisance.

nothing more than encroachment on the legal powers and control of the public or of one's neighbor. It is generally, though not necessarily, a continuing trespass.[4]

2. Iura in re aliena. Another kind of nuisance consists in obstructions of rights of way and other rights over the property of others. "The parishioners may pull down a wall which is set up to their nuisance in their way to the church."[5] In modern times the most frequent and important examples of this class are cases of interference with rights to light.

3. Convenience and enjoyment. A third kind, and that which is most commonly spoken of by the technical name, is the continuous doing of something which interferes with another's health or comfort in the occupation of his property, such as carrying on a noisy or offensive trade.[6]

Measure of nuisance. What amount of annoyance or inconvenience will amount to a nuisance in point of law cannot, by the nature of the question, be defined in precise terms.

(a) **It is not necessary, to constitute a private nuisance, that the acts or state of things complained of should be noxious in the sense of being injurious to health. It is enough that there is a material interference with the ordinary comfort and convenience of life** — "the physical comfort of human existence"— by an ordinary and reasonable standard; there must be comething more than mere loss of amenity, but there need not be positive hurt or disease.[7]

(b) In ascertaining whether the property of the plaintiff is in fact injured, or his comfort or convenience in fact materially interfered with, by an alleged nuisance, **regard is had to the character of the neighborhood and the pre-existing circumstances.** But the fact that the plaintiff was already exposed to some inconvenience of the same kind will not of itself deprive him of his remedy. Even if there was already a nuisance, that is not a reason why the defendant should set up an additional nuisance.[8]

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4. F. N. B., 184D; Penrudock's Case, 5 Co. Rep. 100b.

5. F. N. B., 185B; Harrop v. Hirst, L. R. 4 Ex. 43.

6. Harrison v. Water Co., 2 Ch. 409.

7. Burdick on Torts (3d Ed.), 457.

8. Id., 458.

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9. Salvin v. Coal Co., 9 Ch. 705; note, Webb's Pollock's Torts, 497; Bardick on Torts (3d Ed.), 462.

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The right to light is not a natural right incident to the ownership of windows, but an easement to which title must be shown by grant, express or implied, or by **prescription** at common law, or under the Prescription Act.[5]

Assuming the right to be established, there is a **wrongful disturbance if the building in respect of which it exists is so far deprived of access of light as to render it materially**

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Neither does it make any difference that the very nuisance complained of existed before the plaintiff became owner or occupier. It was at one time held that if a man came to the nuisance, as was said, he had no remedy; but this has long ceased to be law as regards both the remedy by damages, and the remedy by injunction.[9] The defendant may in some cases justify by prescription, or the plaintiff be barred of the most effectual remedies by acquiescence. But these are distant and special grounds of defence, and if relied on must be fully made out by appropriate proof.

Further, the wrong and the right of action begin only when the nuisance begins. Therefore, if Peter has for many years carried on a noisy business on his own land, and his neighbor John makes a new building on his own adjoining land, in the occupation whereof he finds the noise, vibration, or the like, caused by Peter's business, to be a nuisance, Peter cannot justify continuing his operations as against John by showing that before John's building was occupied, John or his predecessors in title made no complaint.

(c) **Again a nuisance is not justified by showing that the trade or occupation causing the annoyance is, apart from that annoyance, an innocent or laudable one.** "The building of a lime-kiln is good and profitable; but if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it."[1]

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(f) **Where a distinct private right is infringed, though it be only a right enjoyed in common with other persons, it is immaterial that the plaintiff suffered no specific injury beyond those other persons, or no specific injury at all.** Thus any one commoner can sue a stranger who lets his cattle depasture the common; and any one of a number of inhabitants entitled by local custom to a particular water supply can sue a neighbor who obstructs that supply.[4]

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less fit for comfortable or beneficial use or enjoyment in its existing condition; if a dwelling-house, for ordinary habitation; if a warehouse or shop, for the conduct of business.

Disturbing the private franchise of a market or a ferry is commonly reckoned a species of nuisance in our books.

The remedies for nuisance are threefold: **abatement, damages,** and **injunction**: of which the first is by the act of the party aggrieved, the others by process of law. Damages are recoverable in all cases where nuisance is proved, but in many cases are not an adequate remedy. The more stringent remedy by injunction is available in such cases, and often takes the place of abatement where that would be too hazardous a proceeding.

The abatement of obstructions to highways, and the like, is still of importance as a means of asserting public rights. Private rights which tend to the benefit of the public, or a considerable class of persons, such as rights of common, have within recent times been successfully maintained in the same manner, though not without the addition of judicial proceedings.

If another man's tree overhangs my land, I may lawfully cut the overhanging branches; and in these cases where the nuisance is in the nature of a trespass, and can be abated without entering on another's land, it does not appear that the wrong-doer is entitled to notice. But if the nuisance is on the wrong-doer's own tenement, he ought first to be warned and required to abate it himself. After notice and refusal, entry on the land to abate the nuisance may be justified.

In the case of abating nuisances to a right of common, notice is not strictly necessary unless the encroachment is a dwelling-house in actual occupation; but if there is a question of right to be tried, the more reasonable course is to give notice. The same rule seems on principle to be applicable to the obstruction of a right of way.

It is doubtful whether there is any private right to abate a nuisance consisting only in omission except where the person aggrieved can do it without leaving his own tenement in respect of which he suffers, and perhaps except in cases of urgency such as to make the act necessary for the immediate safety of life or property.

In every case the party taking on himself to abate a nuisance must avoid doing any unnecessary damage as is shown by the old form of pleading in justification. Thus it is lawful to remove a gate or barrier which obstructs a right of way, but not to break or deface it bayond what is necessary for the purpose of removing it.[6]

Formerly there were processes of judicial abatement available for freeholders under the writ *Quod permittat* and the assize of nuisance. But these remedies have been superseded by **action on the case** at law[7] and by **injunction** in the Court of Chancery.[8]

Damages. Persistence in a proved nuisance is stated to be a just cause for giving **exemplary damages.** There is a place for **nominal damages** in cases where the nuisance consists merely in the obstruction of a right of legal enjoyment, such as a right of common, which does not cause any specific harm or loss to the plaintiff. At common law damages could not be awarded for any injury received from the continuance of a nuisance since the commencement of the action.

The most efficient and flexible remedy is that of **injunction.** Under this form the court can prevent that from being done which, if done, would cause a nuisance.

In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages. The injury must be either irreparable or continuous. It is not, however, a necessary condition of obtaining an injunction to show material specific damage. Continuous interference with a legal right in a manner capable of producing material damage is enough.[9]

As to the person entitled to sue for a nuisance: as regards

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6. See Burdick on Torts (3d Ed.), 226.

"A person takes no little risk when he ventures upon abating nuisances by his own act." See for details, Burdick on Torts (3d Ed.), 227 and cases.

7. See *ante*, Pleading, Action on the Case.

8. See *ante*, Equity, Injunctions; Burdick on Torts (3d Ed.), 474, and generally, Joyce on Injunctions.

9. See, generally, Joyce on Injunctions and next note, *supra*.

interference with the actual enjoyment of property, only **the tenant in possession** can sue; but **the landlord or reversioner can sue if the injury is of such a nature as to affect his estate,** say by permanent depreciation of the property, or by setting up an adverse claim of right.[1]

As to liability: The person primarily liable for a nuisance is he who actually creates it, whether on his own land or not.[2] **The owner or occupier of land** on which a nuisance is created, though not by himself or by his servants, may also be liable in certain conditions. If a man lets a house or land with a nuisance on it, he as well as the lessee is answerable for the continuance thereof, if it is caused by the omission of repairs which as between himself and the tenant he is bound to do, but not otherwise.[3] It seems the better opinion that where the tenant is bound to repair, the lessor's knowledge, at the time of letting, of the state of the property demised makes no difference, and that only something amounting to an authority to continue the nuisance will make him liable.

Again, an occupier who by license (not parting with the possession) authorizes the doing on his land of something whereby a nuisance is created is liable. But a lessor is not liable merely because he has demised to a tenant something capable of being so used as to create a nuisance, and the tenant has so used it. Nor is an owner not in possession bound to take any active steps to remove a nuisance which has been created on his land without his authority and against his will.

If one who has erected a nuisance on his land conveys the land to a purchaser who continues the nuisance, the vendor remains liable, and the purchaser is also liable if on request he does not remove it.[4]

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1. See Dicey on Parties, 340.

2. See Thompson v. Gibson, 7 M. & W. 456.

3. Todd v. Flight, 9 C. B. N. S. 377; Pretly v. Bickmore, L. R. 8 C. P. 401; Burdick on Torts (3d Ed.), 470.

4. See note, Webb's Pollock's Torts, 529.

CHAPTER XI.

NEGLIGENCE.

1. *The General Conception.*

For acts and their results (within the limits expressed by the term "natural and probable consequences," and subject to the grounds of justification and excuse), the actor is, generally speaking, held answerable by law. For mere omission a man is not, generally speaking, held answerable. Unless he is under some specific duty of action, his omission will not in any case be either an offence or a civil wrong. Some already existing relation of duty must be established, which relation will be found in most cases, though not in all, to depend on a foregoing voluntary act of the party held liable. He was not in the first instance bound to do anything at all; but by some independent motion of his own he has given hostages, so to speak, to the law. Thus I am not compelled to employ servants, but if I do, I must answer for their conduct in the course of their employment. The widest rule of this kind is that which is developed in the law of Negligence. **One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against that risk.**

The caution that is required is in proportion to the magnitude and the apparent imminence of the risk. The general rule is that every one is bound to exercise due care towards his neighbors in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default.

In some cases **this ground of liability may co-exist with a liability on contract** towards the same person, and arising (as regards the breach) out of the same facts. Where a man interferes gratuitously, he is bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case. And this duty is not affected

by the fact, if so it be, that he is acting for reward, in other words, under a contract, and may be liable on the contract. The two duties are distinct, except so far as the same party cannot be compensated twice over for the same facts, once for the breach of contract and again for the wrong. Negligence in performing a contract and negligence independent of contract create liability in diherent ways; but the authorities that determine for us what is meant by negligence are in the main applicable to both.

The general rule was thus stated by Baron Alderson: "**Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do:**"[1] provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care. The standard of duty is not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man, the average prudent man, or, as our books rather affect to say, a reasonable man — standing in this or that man's shoes.

The general duty of diligence includes the particular duty of competence in cases where the matter taken in hand is of a sort requiring more than the knowledge or ability which any prudent man may be expected to have. The test is whether the defendant has done "all that any skilful person could reasonably be required to do in such a case."[2]

2. *Evidence of Negligence.*

Whether due care and caution have been used in a given case is, by the nature of things, a question of fact.[3] But it

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1. See several judicial definitions of negligence in Burdick on Torts (3d Ed.), 477; note, Webb's Pollock's Torts, 537.

2. 5 B. & A. 846, per Bailey, J.

3. As to whether negligence is devisible into degrees corresponding to degrees of care required of defendant, and as to how many such degrees there are or whether there are no such degrees of care or negligence, see Burdick on Torts (3d Ed.), 479.

Mr. Burdick adopts the prevalent view that there are three degrees of

is not a pure question of fact in the sense of being open as a matter of course and without limit. Before the court or the jury can proceed to pass upon the facts alleged by the plaintiff, the court must be satisfied that those facts, if proved, are in law capable of supporting the inference that the defendant has failed in what the law requires at his hands. In the current forensic phrase, there must be evidence of negligence.

Where there is no contract between the parties the burden of proof is on him who complains of negligence. "Where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury."[4]

Sometimes it is said that the burden of proof is on the plaintiff to show that he was himself using due care, and it has been attempted to make this supposed principle a guide to the result to be arrived at in cases where the defence of contributory negligence is set up. We do not think this view tenable on the recent English authorities.[5]

The general principle has to be modified where there is a relation of contract between the parties, and (it should seem) when there is a personal undertaking without a contract.

Thus, when a railway train runs off the line, or runs into another train, both permanent way and carriages, or both trains (as the case may be) being under the same company's control, these facts, if unexplained, are as between the company and a passenger evidence of negligence.[6]

In like manner if a man has undertaken, whether for reward or not, to do something requiring special skill, he may fairly be called on, if things go wrong, to prove his competence; though if he is a competent man, the mere fact

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negligence: Gross, or the failure to exercise even slight care; ordinary or the failure to exercise ordinary care, and slight or the failure to exercise great care. Id., 480 *et seq.* and cases cited.

4. Hammock v. White, 11 C. B. N. S. 588.

5. Wakelin v. Railway Co., 12 App. Cas. 41, 47, 51. See, however, Murphy v. Deane, 101 Mass. 455.

6. Carpue v. Railway Co., 5 Q. B. 747, 751. See note, Webb's Pollock's Torts, 548.

of a mishap (being of a kind that even a competent person is exposed to) would of itself be no evidence of negligence.

Again there is a presumption of negligence when the cause of the mischief was apparently under the control of the defendant or his servants.[7]

Therefore, if I am lawfully and of right passing in a place where people are handling heavy goods, and goods being lowered by a crane fall upon me and knock me down, this is evidence of negligence against the employer of the men who were working the crane.[8]

The court will take judicial notice of what happens in the ordinary course of things, as all events to the extent of using their knowledge of the common affairs of life to complete or correct what is stated by witnesses.[9]

When the evidence, if believed, is less consistent with diligence than with negligence on the defendant's part, or shows the non-performance of a specific positive duty laid on him by statute, contract, or otherwise; then the judgment whether the plaintiff has suffered by the defendant's negligence is a judgment of fact, and on a trial by jury must be left as such in the hands of the jury.[1]

"The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred."[2]

The amount of caution required of a citizen in his conduct is proportioned to the amount of apparent danger. In estimating the probability of danger to others, we are entitled to assume, in the absence of anything to show the contrary, that they have the full use of common faculties, and are capable of exercising ordinary caution.

On the other hand it seems clear that **greater care is re-**

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7. Scott v. London Dock Co., 3 H. & C. 596.

8. 3 H. & C. 596.

9. Crafter v. P. R. Co., L. R. 1 C. P. 300.

1. McCully v. Clark, 40 Pa. St. 399; Big. Lead. Cases Torts, 559.

2. Metropolitan R. R. Co. v. Jackson, 3 App. Cas. 193, 197, per Lord Cairns.

quired of us when it does appear that we are dealing with persons of less than ordinary faculty. Thus, if a man driving sees that a blind man, an aged man, or a cripple, is crossing the road ahead, he must govern his course and speed accordingly. He will not discharge himself, in the event of a mishap, merely by showing that a young and active man with good sight would have come to no harm.[3]

3. *Contributory Negligence.*[4]

In order that a man's negligence may entitle another to a remedy against him, that other must have suffered harm whereof this negligence is the proximate cause. "The received and usual way of directing a jury [in case of so-called contributory negligence] is to say that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover."[5] That is to say, he is not to lose his remedy merely because be has been negligent at some stage of the business, though without that negligence the subsequent events might not or could not have happened; but only if he has been negligent in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is proximately due to his own want of care and not to the defendant's. The rule is subject to this qualification, "namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." Negligence will not disentitle the plaintiff to recover, unless it be such that without it the harm complained of could not have happened;[6] "nor if the defendant might by the exercise of care on his part have avoided the

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3. See Cooley on Torts (Students' Ed.), 687, 688.

4. See, generally, as to contributory negligence, Burdick on Torts (3d Ed.), 487 *et seq.*

5. 3 App. Cas. 1207, per Lord Blackburn,

6. Not "could." See Bevan on Negligence, 132.

consequences of the neglect or carelessness of the plaintiff."

The plaintiff may fail because it appears that the decisive cause of his damage was his own want of due care. On the same principle he may fail **if the decisive cause was want of due care on the part of some other person indifferent to the defendant.** As regards the defendant, the case is the same as if the accident had been altogether inevitable. Hence if A. is riding in B.'s carriage, driven by B.'s servant, and through a collision with C.'s carriage A. takes hurt, the decision must in every case depend on the question of fact to whose fault the harm was proximately due. If the negligence or wilful wrong of C.'s driver was the sole proximate cause, A.'s remedy will be against C. If B.'s driver was in fault so that his wrong and not that of C.'s driver was the proximate cause, A. may have a remedy against B., but has none against C.[7]

There may be more than one proximate cause; there are cases in which two or more persons have so acted, though not in concert or simultaneously, as to be liable as joint wrong-doers. A leaves a loaded gun in a place accessible to young persons; B. and C., two schoolboys, come there; B. takes up the gun, points it at C., and draws the trigger; the gun goes off and bursts, wounding both B. and C. Here B. cannot sue A., but as regards C., A. and B. are joint wrong-doers.

Accidents to children in custody of adult. Again if A. is a child of tender years (or other person incapable of taking ordinary care of himself), but in the custody of M., an adult, and one or both of them suffer harm under circumstances tending to prove negligence on the part of Z., and also contributory negligence on the part of M., Z. will not be liable to A. unless Z.'s negligence was the proximate cause of the mischief. Therefore if M. could, by such reasonable diligence as is commonly expected of persons having the care of young children, have avoided the consequences of Z.'s negligence, A. is not entitled to sue Z.: and this not because M.'s negligence is imputed by a fiction of law to A., who by the hypothesis is incapable of either dili-

7. See text and note, Webb's Pollock's Torts, 573 *et seq.*

gence or negligence, but because the needful foundation of liability is wanting, namely, that Z.'s negligence, and not something else for which Z. is not answerable and which Z. had no reason to anticipate, should be the proximate cause.

Children, &c., unattended. Now take the case of a child not old enough to use ordinary care for its own safety, which by the carelessness of the person in charge of it is allowed to go alone in a place where it is exposed to danger. If the child comes to harm, does the antecedent negligence of the custodian make any difference to the legal result? On principle, surely not, unless a case can be conceived in which that negligence is the proximate cause. No English decision has been met with that goes the length of depriving a child of redress on the ground that a third person negligently allowed it to go alone.[8] In America there have been such decisions in Massachusetts,[9] New York, and elsewhere; "but there are as many decisions to the contrary;"[1] and the supposed rule in Thorogood v. Bryan,[2] has been explicitly rejected by the Supreme Court of the United States.[3]

The common-law rule of contributory negligence is unknown to the maritime law administered in courts of Admiralty jurisdiction. Under a rule commonly called *judicium rusticum,* the loss is equally divided in cases of collision, where both ships are found to have been in fault.[4]

4. *Auxiliary Rules and Presumptions.*

A man, who by another's want of care finds himself in a position of imminent danger, cannot be held gulity of negligence merely because in that emergency he does not act in the best way to avoid the danger. That which appears the best way to a court examining the matter after-

8. See Mangan v. Atterton, L. R. 1 Ex. 239.

9. See Holmes, Common Law, 128.

1. See Big. Lead. Cases Torts, 729.

2. 8 C. B. 115; 18 L. J. C. P. 336 (1849).

3. See, generally, Burdick on Torts (3d Ed.), 499 *et seq.;* note and text, Webb's Pollock's Torts, 584.

4. Marsdon on Collisions at Sea (3d Ed.), ch. 6.

wards at leisure and with full knowledge is not necessarily obvious even to a prudent and skilful man on a sudden alarm. Still less can the party whose fault brought on the risk be heard to complain of the other's error of judgment. This rule has been chiefly applied in maritime cases, where a ship placed in peril by another's improper navigation has at the last moment taken a wrong course; but there is authority for it elsewhere.[5]

No man is bound (either for the establishment of his own claims, or to avoid claims of third persons against him) to use special precaution against merely possible want of care or skill on the part of others.[6]

When a person, having an apparent dilemma of evils or risks put before him by another's default, makes an active choice between them, the principle applied is not dissimilar; it is not necessarily and of itself contributory negligence to do something which, apart from the state of things due to the defendant's negligence, would be impudent.[7]

Where the defendant's negligence has put the plaintiff in a situation of imminent peril, the plaintiff may hold the defendant liable for the natural consequences of action taken on the first alarm, though such action may turn out to have been unnecessary.[8] It is also held that the running of even an obvious and great risk in order to save human life may be justified, as against those by whose default that life is put in paril.[9]

A peculiar difficulty may arise in cases **where the acts or omissions of two persons concur to produce damage to a third.**[1] A. leaves the flap of a cellar in an insecure position on a highway where all manner of persons, adult and infant, wise and foolish, are accustomed to pass. B., carelessly passing, or playing with the flap, brings it down on C. It may well be that A. should have anticipated and

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5. The Bywell Castle, 4 P. Div. 219; N. E. Ry. Co. v. Hanlen, L. R. 7 H. L. 16.

6. Daniel v. Railway Co., L. R. 5 H. L. 45.

7. Clayards v. Dettrick, 12 Q. B. 439; note and text, Webb's Pollock's Torts, 592 *et seq.*

8. Coulter v. Express Co., 56 N. Y. (Anno. Reprint) 585 and note.

9. Eckert v. R. R. Co., 43 N. Y. (Anno. Reprint) 502 and note.

1. Burdick on Torts (3d Ed.), 503.

guarded against the risk of a thing so left being meddled with, and therefore is liable to C., though B. also would be liable to C., and of course could not sue A. if he was hurt himself.

CHAPTER XII.

DUTIES OF INSURING SAFETY.

The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such risk is held, although his act is not of itself wrongful, to insure his neighbor against any consequent harm not due to some cause beyond human foresight and control. The leading case upon this subject is Rylands v. Fletcher,[1] where the judgment of the Exchequer Chamber delivered by Blackburn, J., was adopted in terms by the House of Lords.

"It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

"It appears from the statement in the case, that the coal under the defendants' land had at some remote period been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

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1. L. R. 1 Ex. 278; s. c. L. R. 3 H. L. 330.

"It is found that the defendants personally were free from all blame, but that in fact proper care and skill was not used by the persons employed by them, to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir when vlled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

"The plaintiff, though free from all blame on his part, must bear the loss unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more.

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"We think that the true rule of law is, that **the person who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril,** and, if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. **He can excuse himself** by **showing** that the escape was owing to **the plaintiff's default;** or perhaps that the escape was the consequence of **vis major, or the act of God;** but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

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"Upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

This decision was affirmed in the House of Lords, and the reasons given for it fully confirmed.

No subsequent case has been found, not being closely similar in its facts to Rylands v. Fletcher, or within some previously recognized category, in which the unqualified rule of liability without proof of negligence has been enforced.[2]

Exceptions: On the other hand, the rule in Rylands v. Fletcher has been decided by the Court of Appeal not to apply to damage of which the immediate cause is **the act of God.** And the act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; and whether it comes within this description is a question of fact.[3] The authority of Rylands v. Fletcher is unquestioned, but Nichols v. Marsland has practically empowered juries to mitigate the rule whenever its operation seems too harsh.

Again the principal rule does not apply where the immediate cause of damage is the act of a stranger,[4] **nor where the artificial work which is the source of danger is maintained for the common benefit of the plaintiff and the defendant;**[5] and there is some ground for also making an exception where the immediate cause of the harm, though in itself trivial, is of a kind outside reasonable expectation.

There is yet another exception in favor of **persons acting in the performance of a legal duty, or in the exercise of powers specially conferred by law.** Where a zamindar maintained, and was by custom bound to maintain, an ancient tank for the general benefit of agriculture in the district, the Judicial Committee agreed with the High Court

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2. "This bold generalization of Mr. Justice Blackburn has been extravagantly praised and extravagantly censured." See Burdick on Torts (3d Ed.), 505. The case is not generally approved in America. Id., 506 and cases cited; Cooley on Torts (Students' Ed.), 581.

3. Nichols v. Marsland (1875-6), L. R. 10 Ex. 255; 2 Ex. D. 1.

4. Box v. Jubb, 4 Ex. Div. 76.

5. Contairs v. Taylor, L. R. 6 Ex. 217.

of Madras in holding that he was not liable for the consequences of an overflow caused by extraordinary rainfall, no negligence being shown.[6]

Other cases of insurance liability; Cattle Trespass.—It is the nature of cattle and other live stock to stray if not kept in, and to do damage if they stray; and **the owner is bound to keep them from straying on the land of others at his peril,** though liable only for natural and probable consequences,[7] not for an unexpected event, such as a horse not previously known to be vicious kicking a human being. So strict is the rule, that if any part of an animal which the owner is bound to keep in is over the boundary, this constitutes a trespass. The owner of a stallion has been held liable on this ground for damage done by the horse kicking and biting the plaintiff's mare through a wire fence which separated their closes.

The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven: in such case the owner is liable only on proof of negligence; and the law is the same for a town street as for a country road.

"Whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as is the case with an ox," is an undecided point. The better opinion seems to favor a negative answer.

Closely connected with this doctrine is the responsibility of owners of **dangerous animals.** "**A person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril.**"[8] If it escapes and does mischief, he is liable without proof of negligence, neither is proof required that he knew the animal to be mischievous, if it is of a notoriously fierce or michievous species. If the animal is of a tame and domestic kind, the owner is liable only on proof that he knew the particular animal to be "**accustomed to bite mankind,**" as the common

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6. Madras Ry. Co. v. Zemnidar, L. R. 1 Ind. App. 364.

7. Burdick on Torts (3d Ed.), 507.

8. Id., 508; Cooley on Torts (Students' Ed.), 350.

form of pleading ran in the case of dogs, or otherwise vicious; but when such proof is supplied, the duty is absolute as in the former case. It is enough to show that the animal has on foregoing occasions manifested a savage disposition, whether with the actual result of doing mischief on any of those occasions or not.[9]

The risk incident to dealing with **fire, fire-arms, explosive**[1] **or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and** (it is apprehended) **poisons,** is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term "consummate care" is used to describe the amount of caution required; but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him.[2]

As to **fire,** we find it in the fifteenth century stated to be the custom of the realm (which is the same thing as the common law) that every man must safely keep his own fire so that no damage in any wise happen to his neighbor. Liability for domestic fires has been dealt with by statute, and a man is not now answerable for damage done by a fire which began in his house or on his land by accident and without negligence.

The use of fire for non-domestic purposes, if we may coin the phrase, remains a ground of the strictest responsibility.

Decisions of our own time have settled that one who brings fire into dangerous proximity to his neighbor's property, in such ways as by running locomotive engines on a railway without express statutory authority for their use, or bringing a traction engine on a highway, does so at his

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9. Cooley on Torts (Students' Ed.), 346.

1. The liability for damages by explosions in such case seems to be absolute in England; but in the United States the liability is absolute only when defendant's conduct amounts to the maintenance of a nuisance. Otherwise his liability is for negligence. Burdick on Torts (3d Ed.), 510, citing the Nitro Glycerine Case, 15 Wall. 524, and other cases.

2. The manufacturer, seller or user is not an insurer. His liability is for negligence. Id., 511 *et seq.*

peril. In the modern practice of the United States this doctrine has not found acceptance. In New York it has, after careful discussion, been expressly disallowed.

Loaded fire-arms are regarded as highly dangerous things, and persons dealing with them are answerable for damage done by their explosion, even if they have used apparently sufficient precaution.[3]

On a like principle it is held that **people sending goods of an explosive or dangerous nature to be carried are bound to give reasonable notice of their nature, and, if they do not, are liable for resulting damage.** So it was held where nitric acid was sent to a carrier without warning, and the carrier's servant, handling it as he would handle a vessel of any harmless fluid, was injured by its escape.[4]

Gas (the ordinary illuminating coal-gas) is not of itself, perhaps, a dangerous thing, but with atmospheric air forms a highly dangerous explosive mixture, and also makes the mixed atmosphere incapable of supporting life. Persons undertaking to deal with it are therefore bound, at all events, to use all reasonable diligence to prevent an escape which may have such results.

Poisons can do as much mischief as loaded fire-arms or explosives, though the danger and the appropriate precautions are different.

A wholesale druggist in New York purported to sell extract of dandelion to a retail druggist. The thing delivered was in truth extract of belladona, which by the negligence of the wholesale dealer's assistant had been wrongly labelled. By the retail druggist this extract was sold to a country practitioner, and by him to a customer, who took it as and for extract of dandelion, and thereby was made seriously ill. The Court of Appeals held the wholesale dealer liable to the consumer.[5]

Duties imposed by law on the occupiers of buildings, or persons having the control of other structures intended for

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3. Id.
4. Id.
5. Thomas v. Winchester (1852), 6 N. Y. 397; Bigelow L. C., 602; Burdick on Torts (3d Ed.), 512 *et seq.* and cases cited in notes.

human use and occupation, in respect of the safe condition of the building or structure.

The duty is founded not on ownership, but on possession, in other words, on the structure being maintained under the control and for the purposes of the person held answerable. **It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor** for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. **Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in reasonably safe condition, so far as the exercise of reasonable care and skill can make it so.**

In the leading case of Indermaur v. Dames[6] the plaintiff was a journeyman gas-fitter, employed to examine and test some new burners which had been supplied by his employer for use in the defendant's sugar-refinery. While on an upper floor of the building, he fell through an unfenced shaft which was used in working hours for raising and lowering sugar. It was found as a fact that there was no want of reasonable care on the plaintiff's part, which amounts to saying that even to a careful person not already acquainted with the building the danger was an unexpected and concealed one. The court held that on the admitted facts the plaintiff was in the building as "a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission." They therefore had to deal with the general question of law "as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class.

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"The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that dan-

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6. L. R. 1 C. P. 274; 2 C. P. 311; s. c. Bigelow L. C., Torts, 668-697. See, also, note pp. 697-710 and cases cited.

ger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

"And, with respect to such a visitor at least, we consider it settled law, that **he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know**; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."[7]

The court goes on to admit that "**there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place would reasonably be,** having regard to the contrivances necessarily used in carrying on the business."

It is hardly needful to add that a customer, or other person entitled to the like measure of care, is protected not only while he is actually doing his business, but while he is entering and leaving.

With regard to the person, one acquires this right to safety by being upon the spot, or engaged in work on or about the property whose condition is in question, in the course of any business in which the occupier has an interest. It is not necessary that there should be any direct or apparent benefit to the occupier from the particular transaction.

The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier, or rather controller. It extends to gangways or staging in a dock; to a temporary stand put up for seeing a race or the like; to carriages travelling on a railway or road, or in which goods are despatched; to ships; and to market-places.[8]

In the various applications we have mentioned, **the duty**

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7. Burdick on Torts (3d Ed.), 515 *et seq.* and cases cited.

8. See Burdick on Torts (3d Ed.), 514 *et seq.*; Webb's Pollock's Torts, and notes, 627, 629 and cases cited.

does not extend to defects incapable of being discovered by the exercise of reasonable care, such as latent flaws in metal; though it does extend to all such as care and skill (not merely care and skill on the part of the defendant) can guard against.

Again ,when the builder of a ship or carriage, or the maker of a machine, has delivered it out of his own possession and control to a purchaser, he is under no duty to persons using it as to its safe condition, unless the thing was in itself of a noxious or dangerous kind, or (it seems), unless he had actual knowledge of its being in such a state as would amount to a concealed danger to persons using it in an ordinary manner and with ordinary care.

Occupiers of fixed property are under a like duty towards persons passing or being on adjacent land by their invitation in the sense above mentioned, or in the exercise of an independent right.

Where damage is done by the falling of objects into a highway from a building, the modern rule is that **the accident, in the absence of explanation, is of itself evidence of negligence.**

The owner of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against.

But where an accident happens in the course of doing on fixed property work which is proper of itself, and not usually done by servants, and there is no proof either that the work was under the occupier's control, or that the accident was due to any defective condition of the structure itself with reference to its ordinary purposes, **the occupier** is not liable. In other words, he **does not answer for the care or skill of an independent and apparently competent contractor** in the doing of that which, though connected with the repair of a structure for whose condition the occupier does answer, is in itself merely incident to the contractor's business and under his order and control.

One who comes on or near another's property as a " **bare**

licensee" must take the property as he finds it, and is entitled only not to led into danger by "something like fraud."[9] If the occupier while the permission continues, does something that creates a concealed danger to people availing themselves of it, he may well be liable. And he would of course be liable, not for failure in a special duty, but for wilful wrong, if he purposely made his property dangerous to persons using ordinary care, and then held out his permission as an inducement to come on it.

Invitation is a word applied in common speech to the relation of host and guest. But a guest (that is, a visitor who does not pay for his entertainment) has not the benefit of the legal doctrine of invitation in the sense now before us. He is in point of law nothing but a licensee.

On the same principle, a man who offers another a seat in his carriage is not answerable for an accident due to any defect in the carriage of which he was not aware.

It may probably be assumed that a licensor is answerable to the licensee for ordinary negligence in the sense that his own act or omission will make him liable if it is such that it would create liability as between two persons having an equal right to be there.

CHAPTER XIII.

SPECIAL RELATIONS OF CONTRACT AND TORT.

In modern English practice, personal causes of action cognizable by the superior courts of common law (and now by the High Court in the jurisdiction derived from them) **have been regarded as arising either out of contract or out of wrongs independent of contract.**

We have, however, causes of action nominally in contract which are not founded on the breach of any agreement, and

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9. Licensor is liable only for gross negligence. Burdick on Torts (3d Ed.), 516 and cases cited.

we have torts which are not in any natural sense independent of contract.

This border-land between the law of tort and the law of contract will be the subject of examination in this chapter.

1. *Alternative Forms of Remedy on the same Cause of Action.*

It may be hard to decide whether particular cases fall under this head or under the second, that is, whether there is one cause of action which the pleader has or had the choice of describing in two ways, or two distinct causes of action which may possibly confer rights on and against different parties. The most difficult questions we shall meet with are of this kind.

Misfeasance in doing an act in itself not unlawful is ground for an action on the case.[1] It is immaterial that the act was not one which the defendant was bound to do at all. It is equally immaterial that the defendant may have bound himself to do the act, or to do it competently. The undertaking, if undertaking there was in that sense, is but the occasion and inducement of the wrong. The mere non-performance of a promise cannot, however, be treated as a substantive tort. There must be an active misdoing.

Certain kinds of employment, namely, those of a carrier and an innkeeper, are deemed public in a special sense. If a man holds himself out as exercising one of these, the law casts on him the duty of not refusing the benefit thereof, so far forth as his means extend, to any person who properly applies for it. **The innkeeper must not without a reasonable cause refuse to entertain a traveller, or the carrier to convey goods.**[2] Thus we have a duty attached to the mere profession of the employment, and antecedent to the formation of any contract; and if the duty is broken, there is not a breach of contract but a tort, for which the remedy under the common-law forms of pleading is an action on the case. In effect refusing to enter into the appropriate contract is of itself a tort.

In all other cases under this head there are not two dis-

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1. As to the action on the case, see *ante*, Pleading in this volume.

2. See Burdick on Torts (3d Ed.), 7. 8, 182 and cases cited; note, Webb's Pollock's Torts, 650 *et seq.*

tinct causes of action even in the alternative, nor distinct remedies, but one cause of action with, at most, one remedy in alternative forms. And it was an established rule, as long as the forms of action were in use, that the rights and liabilities of the parties were not to be altered by varying the form. Where there is an undertaking without a contract, there is a duty incident to the undertaking, and if it is broken there is a tort, and nothing else. The rule that if there is a specific contract the more general duty is superseded by it, does not prevent the general duty from being relied on where there is no contract at all. Even where there is a contract, our authorities do not say that the more general duty ceases to exist, or that a tort cannot be committed; but they say that the duty is "founded on contract." The contract, with its incidents either express or attached by law, becomes the only measure of the duties between the parties. There might be a choice, therefor, between forms of pleading, but the plaintiff could not by any device of form get more than was contained in the defendant's obligation under the contract.

Thus an infant could not be made chargeable for what was in substance a breach of contract by suing him in an action on the case; and the rule appears to have been first laid down for this special purpose.

2. *Concurrent Causes of Action.*

Herein we have to consider—

(a) Cases where it is doubtful whether a contract has been formed or there is a contract "implied in law" without any real agreement in fact, and the same act which is a breach of the contract, if any, is at all events a tort;

(b) Cases where A. can sue B. for a tort, though the same facts may give him a cause of action against M. for breach of contract;

(c) Cases where A. can sue B. for a tort, though B.'s misfeasance may be a breach of a contract made not with A. but with M.

(a) There are two modern railway cases in which the majority of the court held the defendants liable on a contract, but it was also said that even if there was no contract there was an independent cause of action. In Denton v. Great Northern Railway Company,[3] an intending passenger was held to have a remedy for damage sustained by acting on an erroneous announcement in the company's current time-table, probably on the footing of the time-table being the proposal of a contract, but certainly on the ground of its being a false representation. In Austin v. Great Western Railway Company,[4] an action for harm suffered in some accident of which the nature and particulars are not reported, the plaintiff was a young child just above the age up to which children were entitled to pass free. The plaintiff's mother, who had charge of him, took a ticket for herself only. It was held that the company was liable either on an entire contract to carry the mother and the child (enuring, it seems, for the benefit of both, so that the action was properly brought by the child), or independently of contract, because the child was accepted as a passenger, and this cast a duty on the company to carry him safely. Such a passenger is, in the absence of fraud, in the position of using the railway company's property by invitation, and is entitled to the protection given to persons in that position by a class of authorities now well established.

Again if a servant traveling with his master on a railway loses his luggage by the negligence of the company's servants, it is immaterial that his ticket was paid for by his master, and he can sue in his own name for the loss. Evidently the plaintiff in a case of this kind must make his choice of remedies, and cannot have a double compensation for the same matter, first as a breach of contract and then as a tort; at the same time the rule that the defendant's liability must not be increased by varying the form of the claim is not here applicable, since the plaintiff may rely on the tort notwithstanding the existence of doubt whether

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3. 5 E. & B. 860; 25 L. J. Q. B. 129. See Burdick on Torts (3d Ed.), 428, 429 and notes.

4. L. R. 2 Q. B. 442 (1867).

there be any contract, or, if there be, whether the plaintiff can sue on it.

On the other hand we have **cases in which an obvious tort is turned into a much less obvious breach of contract** with the undisguised purpose of giving a better and more convenient remedy. Thus it is an actionable wrong to retain money paid by mistake, or on a consideration which has failed, and the like; but in the eighteenth century the fiction of **a promise "implied in law"** to repay the money so held was introduced and afforded "a very extensive and beneficial **remedy, applicable to almost every case where the defendant has received money which ex aequo et bono he ought to refund**" and even to cases where goods taken or retained by wrong had been converted into money. **The plaintiff was said to "waive the tort" for the purpose of suing in assumpsit on the fictitious contract.**[5]

Within still recent memory an essentially similar fiction of law has been introduced in **the case of an ostensible agent obtaining a contract in the name of a principal whose authority he misrepresents.** A person so acting is liable for deceit; but that liability, being purely in tort, does not extend to his executors, neither can he be held personally liable on a contract which he purported to make in the name of an existing principal. To meet this difficulty it was held in Collen v. Wright[6] that when a man offers to contract as agent there is an implied warranty that he is really authorized by the person named as principal, on which warranty he or his estate will be answerable *ex contractu.*

(b) **There may be two cases of action with a common plaintiff, or the same facts may give Z. a remedy in contract against A., and also a remedy in tort against B.**

The latest and most authoritative decision on facts of this kind was given by the Court of Appeal in 1880.[7]

The plaintiff, a railway passenger with a return ticket,

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5. Burdick on Torts (3d Ed.), 28. See *ante*, Pleading, Common Counts.

6. Ex. Ch. (1857) 8 E. & B. 647; 27 L. J. Q. B. 215. See, also, notes, Webb's Pollock's Torts, 659.

7. Foulkes v. Metrop. Dist. R. Co., 5 C. P. Div. 157. Cp. Berringer v. G. E. R. Co. (1879), 4 C. P. D. 163. See, also, note, Webb's Pollock's Torts, 661.

alighting at his destination at the end of the return journey, was hurt by reason of the carriages being unsuitable to the height of the platform at the station. This station and platform belonged to one company (the South Western), by whose clerk the plaintiff's ticket had been issued: the train belonged to another company (the District), who used the station and adjoining line under running powers. There was an agreement between the two companies whereby the profits of the traffic were divided. The plaintiff sued the District Company, and it was held that they were liable to him even if his contract was with the South Western Company alone. The District Company received him as a passenger in their train, and were bound to provide carriages not only safe and sound in themselves, but safe with reference to the permanent way and appliances of the line. In breach of this duty they provided, according to the facts as determined by the jury, a train so ordered that "in truth the combined arrangements were a trap or snare," and would have given the plaintiff a cause of action though he had been carried gratuitously. He had been actually received by the defendants as a passenger, and thereby they undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey.

(c) **There may be two causes of action with a common defendant,** or the same act or event which makes A. liable for a breach of contract to B. may make him liable for a tort to Z.

The case already mentioned of the servant travelling by railway with his master would be an example of this if it were determined, on any particular state of facts, that the railway company contracted only with the master. They would not be less under a duty to the servant, and liable for a breach thereof, because they might also be liable to the master for other consequences, on the ground of a breach of their contract with him.[8]

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8. Marshall's Case, 11 C. B. 655;
L. R. 3 Ex. 14, per Bramwell, B.;
Webb's Pollock's Torts, 662, 663.

3. *Causes of Action in Tort dependent on a Contract not between the same Parties.*

(a) When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to the promisee constitute the object of a kind of real right which a stranger to the contract can infringe, and thereby render himself answerable *ex delicto?* It was decided by the Court of Queen's Bench in Lumley v. Gye (1853),[9] and by the Court of Appeal in Bowen v. Hall (1881),[1] that an action lies, under certain conditions, for procuring a third person to break his contract with the plaintiff.

First, **actual damage must be alleged and proved.** This at once shows that the right violated is not an absolute and independent one like a right of property, for the possibility of a judgment for nominal damages is in our law the touchstone of such rights. **Where specific damage is necessary to support an action, the right which has been infringed cannot be a right of property,** though in some cases it may be incident to property.

Next, **the defendant's act must be malicious,** in the sense of being aimed at obtaining some advantage for himself at the plaintiff's expense, or at any rate at causing loss or damage to the plaintiff. Mere knowledge that there is a subsisting contract will not do. In the decided cases the defendant's object was to withdraw from a rival in business and procure for himself the services of a peculiarly skilled person,—in the earlier case, an operatic singer; in the later, a craftsman, to whom, in common with only a few others, a particular process of manufacture was known.

The general habit of the law is not to regard motive as distinguished from intent; but there are well established exceptions to it, of which the action for malicious prosecution is the most conspicuous. The malicious procuring of

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9. 2 E. & B. 216; 22 L. J. Q. B. 463; by Crompton, Erle, and Wightman, JJ.; diss. Coleridge, J.; s. c. Bigelow Lead. Cases, 306.

1. 6 Q. B. Div. 333; by Lord Selborne, L. C., and Brett, L. J.; diss. Lord Coleridge, C. J.

a breach of contract, or of certain kinds of contracts, forms one more exception.

In America the decision in Lumley v. Gye has been followed in Massachusetts and elsewhere, and is generally accepted, with some such limitation as here maintained. The rule "does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right of free expression of opinion."[2]

(b) **A breach of contract, as such, will generally not be a cause of action for a stranger.** And on this principle it is held by our courts that where a message is incorrectly transmitted by the servants of a telegraph company, and the person to whom it is delivered thereby sustains damage, that person has not any remedy against the company. For the duty to transmit and deliver the message arises wholly out of the contract with the sender, and there is no duty towards the receiver. Wilful alteration of a message might be the ground of an action for deceit against the person who altered it, as he would have knowingly made a false statement as to the contents of the message which passed through his hands. But a mere mistake in reading off or transmitting a letter or figure, though it may materially affect the sense of the despatch, cannot be treated as a deceit.

"**In America, on the other hand, one who receives a telegram which, owing to the negligence of the telegraph company, is altered or in other respects untrue, is invariably permitted to maintain an action against the telegraph company** for the loss that he sustains through acting upon that telegram." In the present writer's opinion the American decisions, though not all the reasons given for them, are on principle correct.[3]

(c) **There are likewise cases where an innocent and even a prudent person will find himself within his right, or a wrong-doer, according as there has or has not been a contract between other parties under which the property or**

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2. Burdick on Torts (3d Ed.), 79 and cases cited in note; Bigelow Lead. Cases, 306, 325, note.

3. See Burdick on Torts (3d Ed.), 548-556, where the subject is fully considered and the cases collected.

lawful possession of goods has been transferred. If a man fraudulently acquires property in goods, or gets delivery of possession with the consent of the true owner, he has real though a defeasible title, and at any time before the contract is avoided (be it of sale or any form of bailment) he can give an indefeasible title by delivery over to a buyer or lender for valuable consideration given in good faith.[4] On the other hand a man may obtain the actual control and apparent dominion of goods not only without having acquired the property, but without any rightful transfer of possession. He may obtain possession by a mere trick, for example, by pretending to be another person with whom the other party really intends to deal, or the agent of that person. In such a case a third person, even if he has no means of knowing the actual possessor's want of title, cannot acquire a good title from him unless the sale is in market overt,[5] or the transaction is within some special statutory protection, as that of the Factors' Acts. He deals, however innocently, at his peril.[6]

4. *Measure of Damages and other Incidents of the Remedy.*

With regard to the measure of damages, the same principles are to a great extent applicable to cases of contract and of tort, and even rules which are generally peculiar to one branch of the law may be applied to the other in exceptional classes of cases.

The liability of a wrong-doer for his act is determined by the extent to which the harm suffered by the plaintiff was a natural and probable consequence of the act. It seems on the whole that this is also the true measure of liability for breach of contract; the judgment of what is natural and probable being taken as it would have been formed by a reasonable man in the defendant's place at the

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4. See Pease v. Gloahec, L. R. 1 P. C. 219.

5. Not applicable to this country. See vol. 1 (Blackstone), Market Overt.

6. See Cunday v. Lindsay, 3 App. Cas. 459; Hardman v. Booth, 1 H. & C. 803.

date of the wrongful act, or the conclusion of the contract, as the case may be.

Exemplary or vindictive damages, as a rule, cannot be recovered in an action on a contract, and it makes no difference that the breach of contract is a misfeasance capable of being treated as a wrong. **Actions for breach of promise of marriage are an exception,** perhaps in law, certainly in fact.[7] Like results might conceivably follow in the case of other breaches of contract accompanied with circumstances of wanton injury or contumely.

In another respect breach of promise of marriage is like a tort: executors cannot sue for it without proof of special damage to their testator's personal estate. "Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it." The same rule appears to hold as concerning injuries to the person caused by unskilful medical treatment, negligence of carriers of passengers or their servants, and the like, although the duty to be performed was under a contract. Positive authority, however, has not been found on the extent of this analogy.[8]

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7. As to damages recoverable in the case of telegraphic messages, see Burdick on Torts (3d Ed.), 556-560. See Berry v. Da Costa, L. R. 1 C. P. 331; Hale on Damages, 310, 529.

8. See, generally, as to the three kinds of damages and when they are recoverable, Burdick on Torts (3d Ed.), 230-246; Cooley on Torts (Students' Ed.), 123-129; Webb's Pollock's Torts, 682 and notes; Hale on Damages; Sedgwick on Damages, and Sutherland on Damages.

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